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ST. JOHN'S UNIVERSITY
SCHOOL OF LAW

SSN: *****7868 Student No: X03490497 Date Issued: 09-JUN-2021

Page: 1

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Course Level: Professional-Law

Current Program
College : School of Law

Degree Awarded Juris Doctor 06-JUN-2021
Ehrs: 90.00 GPA-Hrs: 70.00 QPts: 266.90 GPA: 3.81
Inst. Honors: Cum Laude
Dean's List

SUBJ	NO.	COURSE TITLE	CRED GRD	PTS R

INSTITUTION CREDIT:

Fall 2018
DEAN'S LIST

BUSI	1090	CONTRACTS I	3.00 B+	9.90
CIVL	1000	CIVIL PROCEDURE	4.00 A	16.00
CONL	1040	CONSTITUTIONAL LAW I	2.00 A	8.00
LGMT	1000	INTRODUCTION TO LAW	2.00 P	0.00
LGMT	2040	PROFESSIONAL DEVELOPMENT	0.00 P	0.00
LRWR	1030	LEGAL WRITING I	2.00 A	8.00
TORT	1040	TORTS	4.00 A	16.00

Ehrs: 17.00 GPA-Hrs: 15.00 QPts: 57.90 GPA: 3.86

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED GRD	PTS R

Institution Information continued:

Spring 2019
DEAN'S LIST

ALSK	2075	LAWYERING	2.00 B+	6.60
BUSI	2000	CONTRACTS II	2.00 A-	7.40
CONL	1050	CONSTITUTIONAL LAW II	3.00 A-	11.10
CRIM	1010	CRIMINAL LAW	3.00 A-	11.10
LGMT	2041	PROFESSIONAL DEVELOPMENT	0.00 P	0.00
LRWR	1010	LEGAL WRITING II	2.00 A	8.00
PROP	1080	PROPERTY	4.00 A	16.00

Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 60.20 GPA: 3.76

Fall 2019
DEAN'S LIST

BUSI	3000	BUSINESS ORGANIZATIONS	4.00 A-	14.80
BUSI	3010	COMMERCIAL ARBITRATION	2.00 A	8.00
CONL	2040	NATIONAL SECURITY AND THE LAW	3.00 A	12.00
DRRS	1000	DIRECTED RESEARCH	2.00 A	8.00
HLTH	1010	BIOETHICS	3.00 A-	11.10

Ehrs: 14.00 GPA-Hrs: 14.00 QPts: 53.90 GPA: 3.85

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Ann M. Hurt
Law School Registrar

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SSN: *****7868 Student No: X03490497 Date Issued: 09-JUN-2021

Record of: Paul A. Schochet
Level: Professional-Law

ST. JOHN'S UNIVERSITY
SCHOOL OF LAW

SUBJ NO.	COURSE TITLE	CRED GRD	PTS R
Institution Information continued:			
Spring 2020			
ALSK 1030	APPELLATE ADVOCACY	2.00 CR	0.00
ALSK 2015	EXTERNSHIP PLACEMENT	2.00 CR	0.00
ALSK 2025	EXTERNSHIP SEMINAR	2.00 CR	0.00
CRIM 1000	WHITE COLLAR CRIME	2.00 CR	0.00
HLTH 1060	PUBLIC HEALTH LAW	3.00 CR	0.00
SFPR 2090	EVIDENCE	4.00 CR	0.00
Ehrs: 15.00 GPA-Hrs: 0.00 QPts:		0.00 GPA:	0.00
Fall 2020			
DEAN'S LIST			
ADGV 1000	ADMINISTRATIVE LAW	3.00 A-	11.10
ALSK 1000	PRE-TRIAL ADVOCACY	3.00 A	12.00
ESTA 1040	TRUSTS AND ESTATES	4.00 A-	14.80
LETH 1000	PROFESSIONAL RESPONSIBILITY	3.00 A-	11.10
Ehrs: 13.00 GPA-Hrs: 13.00 QPts:		49.00 GPA:	3.77
Spring 2021			
ACTV 1040	LAW REVIEW/CATHOLIC LAWYER	3.00 P	0.00
ALSK 8000	DRAFTING: CONTRACTS	2.00 A	8.00
ALSK 9070	DRAFTING: JUDICIAL OPINIONS	2.00 A	8.00
BUSI 2070	SECURITIES REGULATION	3.00 B+	9.90

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO.	COURSE TITLE	CRED GRD	PTS R
Institution Information continued:			
CRIM 1070	CRIM PRO: SENTENCING/POST-CONV	3.00 A	12.00
LABR 1030	LABOR LAW - SPECIAL TOPICS	2.00 A	8.00
Ehrs: 15.00 GPA-Hrs: 12.00 QPts:		45.90 GPA:	3.83

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	90.00	70.00	266.90	3.81
TOTAL TRANSFER	0.00	0.00	0.00	0.00
OVERALL	90.00	70.00	266.90	3.81

********** END OF TRANSCRIPT **********

Ann M. Hurt
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MEMORANDUM

QUESTION PRESENTED

Whether the Court should grant Defendant's motion to dismiss Plaintiff's fraudulent inducement claim for failure to state a claim. Fed. R. Civ. P. 12(b)(6); Fed. R. Civ. P. 9(b). And whether Plaintiff's breach of contract claim is limited to contractually agreed upon remedies under Federal Rule of Civil Procedure 12(b)(6).

SHORT ANSWER

Yes and Yes. First, Plaintiff fails to state the circumstances constituting fraud with sufficient particularity and thus does not meet the heightened pleading standard under Federal Rule of Civil Procedure 9(b). Second, the contracts' exclusive remedy clauses allow for a complete refund so do not fail of their essential purpose. The limited damages clauses are also not unconscionable.

STATEMENT OF FACTS

PRESIDENT CONTAINER GROUP II, LLC ("Plaintiff") manufacturers corrugated boxes and point of purchase displays across North America from its production facility in Middletown, New York. (Ex. A Compl. ¶¶ 2, 3.) To further this business, Plaintiff purchased a BOBST Model 820, a high speed flexo folder gluer to produce boxes more efficiently. (*Id.* ¶ 16.) This new product, however, required a conveyer belt. (*Id.* ¶ 17.) For this need, Plaintiff hired SYSTEC CONVEYORS ("Defendant"). (*Id.*)

After two months of negotiations, the two parties consummated two contracts in December 2016. (*Id.* ¶ 17; Exs. B & C.) One contract was for a Dye Cut Conveyor, (Compl. ¶ 51); the other was for the BOB 820 Conveyor System and the Mainline Conveyor System, (*id.* ¶

52). Both contracts contained a merger clause. (Exs. B at 3 & C at 3.) The contracts also contained a warranty provision stating, in part, that "liability in connection with this transaction is expressly limited to the repair or replacement of defective materials and workmanship or refund of purchase price as herein above provided as Seller may elect, all other damages and warranties, statutory or otherwise, being expressly waived by the Purchaser." (Exs. B at 8 & C at 18.) The contract further limited damages by stating, "[i]n no event shall the Seller be subject to any other or further liability than herein expressly given and on the conditions stated." (Exs. B at 9 & C at 19.)

Defendant delivered and installed the conveyer systems. (Compl. ¶ 84.) But Plaintiff gave Defendant notice that the systems "were not performing as required by the terms of the Contracts." (*Id.* ¶ 17.) Although Defendant made several attempts to cure the alleged-defects, (*id.* ¶¶ 93, 95), the conveyer systems continued to perform deficiently, (*id.* ¶¶ 94, 96). Defendant's efforts at repair, however, did "cure[] certain of the deficiencies." (*Id.* ¶ 102.)

Following these largely failed attempts to remedy the conveyer systems, Plaintiff filed, on April 5, 2018, its complaint in New York state court. (*Id.* ¶ 1.) The complaint pled fraudulent inducement and breach of contract by Defendant, (*id.* ¶¶ 112-24, 125-41), seeking $1,100,015 for ongoing lost production because of the Conveyor Systems' failure, $744,000 for the contract price Plaintiff paid to Defendant, and $515,000 for "special damages," (*id.* ¶ 142(a)-(b).) Then, on May 22, 2018, Defendant removed the action to this Court. (ECF. No. 1.)

Defendant now moves to dismiss Plaintiff's fraudulent inducement claim. (ECF. Nos. 12, 13.) While not conceding it breached the contract, Defendant also moves to dismiss the breach of contract claim to the extent Plaintiff seeks damages excluded by the contracts. (*Id.*) Defendant grounds its motion under Federal Rules of Civil Procedure 12(b)(6) and 9(b). (*Id.*)

DISCUSSION

I. Standard for Motion to Dismiss

A party's pleadings must state a plausible claim "on which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). While the court is to accept "as true all facts alleged in the complaint," *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007), "[t]hreadbare recitals of the elements" or "conclusory statements" are insufficient, *Iqbal*, 556 U.S. at 678.

In addition, a plaintiff pleading fraud must "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Thus, under this heightened pleading standard, a complaint must "(1) detail the statements (or omissions) that the plaintiff contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent." *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 171 (2d Cir. 2015) (internal quotation marks and citation omitted). A plaintiff must also allege facts that "giv[e] rise to the 'strong inference' of actual knowledge of fraud." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 293 (2d Cir. 2006).

II. The Court should grant Defendant's motion to dismiss Plaintiff's fraudulent inducement claim because Plaintiff does not allege Defendant intentionally engaged in material misrepresentation with particularity.

The Court should grant Defendant's motion to dismiss Plaintiff's fraudulent inducement claim. "Under New York law, to state a claim for fraud a plaintiff must demonstrate: (1) a misrepresentation or omission of material fact; (2) which the defendant knew to be false; (3)

which the defendant made with the intention of inducing reliance; (4) upon which the plaintiff reasonably relied; and (5) which caused injury to the plaintiff." *Wynn v. AC Rochester*, 273 F.3d 153, 156 (2d Cir. 2001) (citing *Lama Holding Co. v. Smith Barney Inc.*, 668 N.E.2d 1370, 1373 (N.Y. 1996)).

Fraudulent inducement to enter into a contract, where "a promisor's successful attempts to induce a promisee to enter into a contractual relationship despite the fact that the promisor harbored an undisclosed intention not to perform," is one type of fraud recognized by New York courts. *Neckles Builders, Inc. v. Turner*, 986 N.Y.S.2d 494, 497 (2nd Dep't 2014). The claim of fraud must be "collateral to the contract." *Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 184 (2d Cir. 2007) (citation omitted). And such claims must be pled with "particularity." Fed. R. Civ. P. 9(b); *see United States ex rel. Chorches for Bankr. Estate of Fabula v. Am. Med. Response, Inc.*, 865 F.3d 71, 81 (2d Cir. 2017).

In dispute is the material misrepresentation and scienter elements of New York common law fraud. While Defendant contests that the contracts' merger clauses bar Plaintiff's claim of reasonable reliance on Defendant's representations, this assertion is unavailing. Settled New York law has held "'an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made' is insufficient to bar a claim of fraudulent inducement." *PetEdge, Inc. v. Garg*, 234 F. Supp. 3d 477, 488 (S.D.N.Y. 2017) (quoting *Mfrs. Hanover Tr. Co. v. Yanakas*, 7 F.3d 310, 315 (2d. Cir. 1993)). And the merger clauses here are general, omnibus statements. (*See* Exs. B at 3 & C at 3.) Defendant also contests that the fraudulent inducement claim is not distinct from its breach of contract claim, which is considered below.

a. Plaintiff fails to plead with particularity material representations by Defendant.

From the representations in the complaint, Plaintiff fails to describe circumstances evidencing fraud to meet Rule 9(b)'s heightened pleading standard. An actionable misrepresentation during a contractual negotiation "must be factual in nature and not promissory or relating to future events that might never come to fruition." *Kortright Capital Partners LP v. Investcorp Inv. Advisers Ltd.*, 392 F. Supp. 3d 382, 402 (S.D.N.Y. 2019) (quoting *Hydro Inv'rs, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 20-21 (2d Cir. 2000)). A promise relating to a future event may be actionable, however, when "'made with a preconceived and undisclosed intention of not performing it.'" *Id.* (citation omitted).

In its complaint, Plaintiff lists numerous detailed representations by Defendant. For instance, Plaintiff describes how Defendant represented that its conveyer system would increase the efficiency of its manufacturing operations. (*See* Compl. ¶¶ 16-18.) Plaintiff also showed that Defendant claimed its product would allow the "BOBST 820 to operate at its full design capacity" and in an "efficient manner." (*Id.* ¶¶ 39-40.) And Plaintiff claims Defendant was aware of its products' defects. (*See id.* ¶ 128.)

Yet Plaintiff does not supply the factual foundation explaining how Defendant's representations were fraudulent. *See Quanzhou Joerga Fashion Co. v. Brooks Fitch Apparel Grp., LLC*, No. 10 CIV. 9078 VM MHD, 2011 WL 4063344, at *4 (S.D.N.Y. Aug. 11, 2011) ("In order for a fraud complaint to survive the requirements set by Rule 9(b), it 'must do more than allege simply that statements are false and misleading. It must also plead facts which demonstrate how the statements were false or misleading.'" (citation omitted)). Defendant does not explain how the statements were misleading other than pointing to the conveyer systems' eventual defective performance. But defective performance does not mean Defendant's statements were fraudulent during the negotiations. *See Rombach v. Chang*, 355 F.3d 164, 172

(2d Cir. 2004) (affirming a district court's dismissal of a fraudulent inducement claim because the plaintiff's complaint does "not 'state with particularity . . . that [defendants'] statements were false when made'" (citation omitted and alteration in the original)); *B & M Linen, Corp. v. Kannegiesser, USA, Corp.*, 679 F. Supp. 2d 474, 482 (S.D.N.Y. 2010) (holding plaintiff's allegation of fraud did not meet Rule 9(b)'s heightened pleading standard because "it does not say why these representations turned out to be fraudulent, just that they turned out to be wrong").

And Plaintiff's claim that Defendant knew it could not perform does not salvage its fraudulent inducement claim. Plaintiff merely asserts a conclusory allegation that Defendant "was aware" (Compl. ¶ 128) of its inability to perform its obligations. *Cf. Mktg. Developments, Ltd. v. Genesis Imp. & Exp., Inc.*, No. 08-CV-3168 CBA/CLP, 2009 WL 4929419, at *7 (E.D.N.Y. Dec. 21, 2009) (holding that the plaintiff's "cursory allegations" that the defendant had "no intention of actually paying Plaintiff in full" insufficient to sustain an action for fraud). Indeed, all the evidence is to the contrary. Defendant installed the conveyer systems on time, promptly sought to cure the systems' defects after Plaintiff gave notice, and "cured certain of the deficiencies." (Compl. ¶¶ 84, 93-95, 102.)

Plaintiff seeks to side step these facts by asserting, in its briefs, that Defendant's product was "inherently defective" and "doomed to repeatedly break down." (ECF. No. 15 at 14.) Yet here again Plaintiff does not offer the requisite facts from its pleadings to justify this conclusion. The Court is left to wonder what made Defendant's product "doomed to repeatedly break down"? *Wang v. Feinberg*, No. 17 CIV. 1452 (DAB), 2018 WL 1089293, at *4 (S.D.N.Y. Feb. 6, 2018) (holding that the plaintiff's allegation that the defendant's product was "yet not 'operational'" fails to meet Rule 9(b)'s heightened pleading standard).

Finally, Plaintiff does not offer the Court approximate dates when the fraudulent activity occurred. *See Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993) (stressing the

need for a plaintiff to identify a "date and place" the fraud occurred under Rule 9(b)). Although Plaintiff identifies a range of October 2016 to December 15, 2016, for the alleged-fraud, (ECF. No. 15 at 17), these facts do not satisfy Rule 9(b)'s requirements. Rather than give approximate dates, Plaintiff merely offers the full pre-contract negotiation period. Thus, Plaintiff's offered time period lacks the "'specific information' required by Rule 9(b)." *Negrete v. Citibank, N.A.*, 187 F. Supp. 3d 454, 463 (S.D.N.Y. 2016), *aff'd,* 759 F. App'x 42 (2d Cir. 2019).

Accordingly, the Court should grant Defendant's motion to dismiss Plaintiff's fraudulent inducement claim.

b. Plaintiff does not adequately plead scienter.

Plaintiff fails to plead specific facts showing Defendant's intention to defraud. To prevail on a claim of fraud in New York, "plaintiffs must allege facts that give rise to a strong inference of fraudulent intent." *Acito v. IMCERA Grp., Inc.*, 47 F.3d 47, 52 (2d Cir.1995). To that end, a plaintiff must plead facts that "(i) 'demonstrate the defendant's motive and opportunity to commit or assist in the fraud,' or (ii) 'constitute strong circumstantial evidence of the defendant's conscious misbehavior or recklessness.'" *Negrete,* 187 F. Supp. 3d at 464 (citation omitted).

In this case, the record is absent of any suggestion that Defendant acted other than to make a profit. *Cf. id.* at 464-65 (finding a "generalized profit motive" "does not create the requisite 'strong inference' of fraudulent intent") (collecting cases). At most, Plaintiff's complaint can be plausibly read as alleging unscrupulous business practices by Defendant. Yet such business practices that do not rise to the level of deception are not illegal in New York. *See Taylor v. T-Mobile USA, Inc.*, No. 14CV4965-LTS-JLC, 2015 WL 223782, at *5 (S.D.N.Y. Jan. 16, 2015).

As a result, the Court should grant Defendant's motions to dismiss Plaintiff's fraudulent inducement claim.

c. But Plaintiff does plead fraud separate from its breach of contract claim.

Plaintiff's fraudulent inducement claim seeks distinct damages separate from those underlying its breach of contract claim. In New York, "where a fraud claim arises out of the same facts as plaintiff's breach of contract claim, with the addition only of an allegation that defendant never intended to perform the precise promises spelled out in the contract between the parties, the fraud claim is redundant and plaintiff's sole remedy is for breach of contract." *Telecom Int'l Am., Ltd. v. AT & T Corp.*, 280 F.3d 175, 196 (2d Cir. 2001) (internal quotation marks and citation omitted). Put simply, a plaintiff may not duplicate its breach of contract claim.

Here, the facts pled for Plaintiff's breach of contract claim are merely recycled for its fraudulent inducement claim. In fact, Plaintiff's central allegation for breach of contract—that the conveyer belts were defective—forms the backbone of its fraudulent inducement claim. *See Champion Home Builders Co. v. ADT Sec. Servs., Inc.*, 179 F. Supp. 2d 16, 23 (N.D.N.Y. 2001) (dismissing a fraudulent inducement claim because "[t]he crux of plaintiff's complaint is that ADT did not provide the system which it agreed to install").

New York courts, however, have carved out an exception to the bar on using promises of future acts to make out a claim of fraudulent inducement. In these cases, a plaintiff must "(i) demonstrate a legal duty separate from the duty to perform under the contract; or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract, or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages." *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 20 (2d Cir. 1996) (cleaned up). For the "special damages exception," the plaintiff must show not that his damages "were merely atypical, but that the damages were 'a special consequence of the fraud and can be

separated from the damages they can claim because of the alleged breach of contract.'" *Maricultura Del Norte v. World Bus. Capital, Inc.*, 159 F. Supp. 3d 368, 378-79 (S.D.N.Y. 2015) (citation omitted), *aff'd sub nom. Maricultura Del Norte, S. de R.L. de C.V. v. Umami Sustainable Seafood, Inc.*, 769 F. App'x 44 (2d Cir. 2019).

To begin with, Defendant neither has a separate legal duty to Plaintiff nor were Defendant's statements "colleterial" to the contract. As shown above, all of Defendant's statements in the complaint concerned the contract's formation. And while a warranty generally refers to a present fact colleterial to a contract, *see First Bank of Americas v. Motor Car Funding, Inc.*, 292, 690 N.Y.S.2d 17, 21 (1st Dep't 1999), the warranty provisions here were in the two contracts, *see Elsevier, Inc. v. Grossman*, 77 F. Supp. 3d 331, 352 n.11 (S.D.N.Y. 2015) (dismissing the fraudulent inducement claim because "[t]he only misrepresentations that Plaintiff alleges in this case were the representations and warranties recited in the contract").

To be sure, this fact alone is not dispositive. But the representations within the warranty provisions—that the conveyer systems would be "free from defects" and "[i]n conformance with written specifications," (Exs. B as 8 & C at 18)—"were the very essence of those various agreements." *Bell Sports, Inc. v. Sys. Software Assocs., Inc.*, 45 F. Supp. 2d 220, 228 (E.D.N.Y.); *see also Four Finger Art Factory, Inc. v. Dinicola*, No. 99 CIV. 1259 (JGK), 2000 WL 145466, at *5 (S.D.N.Y. Feb. 9, 2000) ("[T]he plaintiff argues that the alleged false representations which induced it to enter the contract are those which are contained in ¶ 22(a) of the contract. The allegation as to the false warranty is therefore plainly not collateral and it does not support a claim for fraud." (cleaned up)).

That said, the complaint does plausibly allege damages separate from those sought under the breach of contract claim. Specifically, Plaintiff's claim for damages for "ongoing . . . loss of production," (Compl. ¶ 142(a)), falls outside the liquidated damages and warranty provisions in the contract. This claim for damages is not about the diminished value of the parties' bargain; instead, it is premised on the required expenses needed to correct a condition Defendant represented it would supply. *Cf. Trodale Holdings LLC v. Bristol Healthcare Inv'rs L.P.*, No. 16 CIV. 4254 (KPF), 2018 WL 2980325, at *5 (S.D.N.Y. June 14, 2018) (holding that special damages were properly pled because the nonmovant's inability to regain assets "tied up in the" contractual agreement "fell outside of the scope of the liquidated damages provision"). Put differently, Plaintiff alleges damages "unrecoverable as contract damages." *Bridgestone/Firestone, Inc.*. 98 F.3d at 20; *cf. Music Royalty Consulting, Inc. v. Reservoir Media Mgmt., Inc.*, No. 18CIV9480CMKNF, 2019 WL 1950137, at *8 (S.D.N.Y. Apr. 17, 2019) (granting the defendant's motion to dismiss because "[a]ny damages that MRCI incurred . . . is recoverable as ordinary contract damages"). Thus, Plaintiff's claim falls within the New York exception to the bar on using promises of future acts for making a claim of fraudulent inducement.

However, because Plaintiff fails to plead with particularity material representations and scienter by Defendant, the Court should grant Defendant's motion to dismiss Plaintiff's fraudulent inducement claim.

III. **The Court should dismiss plaintiff's breach of contract claim to the extent it seeks damages excluded by the contracts because the warranty provision does not fail of its essential purpose and the liquidated damaged provision is not unconscionable.**

a. The exclusive remedies provisions in the warranty are enforceable.

The contracts' exclusive warranty provisions are enforceable. In New York, contracting parties may restrict a "buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts." N.Y. U.C.C. Law § 2-719(1)(a) (McKinney). These restrictions are enforceable unless the agreed upon remedy "fails of its essential purpose." N.Y. U.C.C. Law § 2-719 (McKinney). "A remedy fails of its essential purpose if the circumstances existing at the time of the agreement have changed so that enforcement of the limited remedy would essentially leave plaintiff with no remedy at all." *Maltz v. Union Carbide Chemicals & Plastics Co.*, 992 F. Supp. 286, 304 (S.D.N.Y. 1998) (internal quotation marks and citation omitted). And while determining whether a limited remedies clause fails of its essential purpose is generally "a question of fact for the jury," *Waverly Properties, LLC v. KMG Waverly, LLC*, 824 F. Supp. 2d 547, 559 (S.D.N.Y. 2011) (citation omitted), a court may grant a defendant's motion to dismiss when the plaintiff cannot show that "enforcement of the limited remedy clause would effectively deprive them of a remedy," *Maltz v. Union Carbide Chemicals & Plastics Co.*, 992 F. Supp. 286, 304 (S.D.N.Y. 1998).

At the outset, Plaintiff alleges a plausible claim that the contracts' exclusive remedy clause limiting recovery to "repair or replacement," (Compl. Exs. B at 8 & C at 18), has failed of its essential purpose. From the complaint, Defendant repeatedly was unable "to cure and/or correct the deficiencies" in the conveyer systems. (Compl. Exs. B at 8 & C at 18). Thus, the circumstances existing at the time of the agreement had changed—namely, the understanding

that Defendant could repair or replace any defect with the conveyer systems—to cause the "repair or replacement" provision to "fail[] of its essential purpose." N.Y. U.C.C. Law § 2-719 (McKinney); *see also, e.g.*, *Feliciano v. Gen. Motors LLC*, No. 14 CIV. 06374 (AT), 2016 WL 9344120, at *5 (S.D.N.Y. Mar. 31, 2016) (holding that the plaintiff plausibly pled the allegation that the limited warranty provision failed of its essential purpose because the defendant "has been unable to repair or adjust: its defective product"); *Seybert-Nicholas Printing Corp. v. MLP U.S.A., Inc.*, No. 92 CIV. 6143 (RPP), 1992 WL 315643, at *1 (S.D.N.Y. Oct. 22, 1992) (similar).

Plaintiff, however, fails to state a plausible claim that the exclusive remedy clause limiting recovery "to [a] refund of purchase price as herein above provided," (Compl. Exs. B at 8 & C at 18), fails of its essential purpose. Restricting contractual recovery to a refund of the purchase price is an accepted limitation in New York. *See Maltz v. Union Carbide Chemicals & Plastics Co.*, 992 F. Supp. 286, 305 (S.D.N.Y. 1998); *Moustakis v. Christie's, Inc.*, 892 N.Y.S.2d 83, 84 (1st Dep't 2009). In fact, the option for buyers to recover a purchase price has been codified into the New York code. *See* N.Y. U.C.C. Law § 2-711(1) (McKinney).

To avoid this established law, Plaintiff asserts that the refund provision failed of its essential purpose because Defendant "has not opted to refund the purchase price." (ECF. No. 15 at 10.) For this claim, Plaintiff cites *Barrie House Coffee Co. v. Teampac*, LLC, No. 13 CV 8230 (VB), 2016 WL 3645199, at *13 (S.D.N.Y. June 30, 2016). But Plaintiff stretches *Barrie House Coffee Co.*'s holding too far. In that case, the court held that the plaintiff had made out a plausible claim that the exclusive-remedy-refund provision failed of its essential purpose because the defendant "refused" on honor the refund provision upon request. *Id.* at *5.

By contrast, Defendant has not refused to honor the exclusive remedy clause. Rather, Defendant claims it has not breached the contract and is thus waiting for the on-going litigation to be resolved. Nor, either in the complaint or in Plaintiff's briefs, is there evidence Plaintiff demanded a refund. If once the breach of contract claim is resolved Defendant continues to not refund Plaintiff of the purchase price, Plaintiff may then have a colorable claim that the exclusive remedy clause fails of its essential purpose.

Therefore, the contracts' exclusive remedy clauses are enforceable, and the Court should grant Defendant's motions to dismiss Plaintiff's breach of contract claim to the extent it seeks damages excluded by the contracts.

b. The liquidated damages provisions are enforceable.

The contracts' liquidated damages provisions are enforceable. Contracting parties may limit or exclude consequential damages unless the such a clause "operate[s] in an unconscionable manner." N.Y. U.C.C. Law § 2-719(3) (McKinney).[1] Determining unconscionability is a question of law. *See McNally Wellman Co., a Div. of Boliden Allis v. New York State Elec. & Gas Corp.*, 63 F.3d 1188, 1198 (2d Cir. 1995) (collecting cases). To that end, a court "generally requires a showing that the contract was both procedurally and substantively unconscionable when made—*i.e.*, some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Id.* (quoting *Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824, 827 (N.Y. 1988)).

[1] Even if the Court were to find that the contracts' exclusive remedy provision failed of its essential purpose, the bar on consequential damages would remain as long as it does not operate in an unconscionable manner. *See Barrie House Coffee Co. v. Teampac, LLC*, No. 13 CV 8230 (VB), 2016 WL 3645199, at *13 (S.D.N.Y. June 30, 2016) (citing *McNally Wellman Co., a Div. of Boliden Allis, Inc. v. N.Y. State Elec. & Gas Corp.*, 63 F.3d 1188, 1197 (2d Cir. 1995)).

The liquidated damages clause is neither procedurally nor substantively unconscionable. First, there were no inequities in the bargaining powers between the parties. According to Plaintiff's own complaint, it is "one of the largest manufacturers of Corrugated Boxes and Point of Purchase Displays in North America." (Compl. ¶ 2.) Nor was Plaintiff deprived a "meaningful choice" when drafting the contract. *McNally Wellman Co., a Div. of Boliden Allis v. New York State Elec. & Gas Corp.*, 63 F.3d 1188, 1198 (2d Cir. 1995). Second, the liquidated damages provision was not "unreasonably favorable" to Defendant. *Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 829 (N.Y. 1988) (defining substantively unconscionable as "whether the terms were unreasonably favorable to the party against whom unconscionability is urged"). Both parties were subject to the provisions and their limitations.

Nor does Plaintiff's claim that Defendant "acted with wilfully [sic] dilatory conduct," (ECF. No. 15 at 12), estop Defendant from asserting the contracts' liquidated damages clauses. It is true that a contracting party acting in bad faith may be estopped from asserting a limitation on consequential damages. *See Verona v. U.S. Bancorp*, No. 7:09-CV-057-BR, 2011 WL 1252935, at *16 (E.D.N.C. Mar. 29, 2011). Yet, as shown in Part II(a), Plaintiff's claims that Defendant acted in bad faith are mere conclusory allegations. *Cf. Iqbal*, 556 U.S. at 678. Plaintiff therefore fails to plausibly plead that Defendant acted in bad faith.

Thus, the contracts' liquidated damages clauses are enforceable, and the Court should grant Defendant's motions to dismiss Plaintiff's breach of contract claim to the extent it seeks damages excluded by the contracts.

CONCLUSION

For the forgoing reasons, the Court should grant Defendant's motion to dismiss Plaintiff's fraudulent inducement and breach of contract claims to the extent it seeks damages excluded by the contracts under Federal Rule of Civil Procedure 12(b)(6) and 9(b) without prejudice.

Applicant Details

First Name	**Simon**
Middle Initial	**J**
Last Name	**Schoen**
Citizenship Status	**U. S. Citizen**
Email Address	**Simon.Schoen@emory.edu**
Address	**Address** Street **1669 Hillshire PL NE** City **Atlanta** State/Territory **Georgia** Zip **30329** Country **United States**
Contact Phone Number	**404-368-9139**

Applicant Education

BA/BS From	**Yeshiva University**
Date of BA/BS	**May 2020**
JD/LLB From	**Emory University School of Law** **https://law.emory.edu/index.html**
Date of JD/LLB	**May 5, 2024**
Class Rank	**I am not ranked**
Law Review/Journal	**Yes**
Journal(s)	**Emory International Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Broyde, Michael
mbroyde@emory.edu
404.727.7546
Freer, Richard
rfreer@emory.edu
404-727-6838
Wolfgruber, Heidi
hcwolfgruber@dekalbcountyga.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Simon J. Schoen
1669 Hillshire PL NE
Atlanta, Georgia 30329
Simon.Schoen@Emory.edu | 404-368-9139

June 11, 2023

The Honorable Juan R. Sanchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Chief Judge Sanchez:

I am writing to express my interest in a clerkship in your chambers for the 2024-2025 term or any term thereafter. I am a rising third-year student at Emory University School of Law, where I am a managing editor of the *Emory International Law Review*.

Last summer, I worked for Chief Judge L. Scott Coogler in the United States District Court for the Northern District of Alabama. I was responsible for conducting research on cases before the court and submitting drafts of opinions to the law clerks. Furthermore, I had the privilege of meeting with Judge Coogler and his clerks each day to discuss and evaluate cases, enhancing my analytical and reasoning skills. I was encouraged to contribute to discussions in a way that helped me to not only participate, but to learn and grow further. Judge Coogler has told me that he is happy to serve as a reference. Should you wish to speak with him, he can be reached at (205) 561-1671.

My experience this summer as an intern at the Dekalb County Public Defender's Office has been extraordinarily productive and fulfilling. I have had the opportunity to perform significant and impactful work since the very first day. I regularly meet with and interview clients to prepare for hearings. I also conduct substantive legal research, review discovery, produce significant written work, and frequently attend a variety of court proceedings. Both of these experiences have been extremely positive and have cemented my passion for litigation.

Thank you very much for considering my application. Included with my application are my resume, law school transcript, an unedited writing sample, and three letters of recommendation. Feel free to contact me at your convenience at (404) 368-9139 or Simon.Schoen@emory.edu. I look forward to hearing from you.

Sincerely,

Simon J. Schoen

Enclosures

SIMON J. SCHOEN
1669 Hillshire PL NE, Atlanta, GA 30329
Simon.Schoen@Emory.edu | 404-368-9139

EDUCATION

Emory University School of Law **Atlanta, GA**
Candidate for Juris Doctor May 2024

- Honors: Merit Scholarship; Dean's List (Spring 2023)
- Activities: Managing Editor, *Emory International Law Review* (Vol. 38); 1L Representative (2021-2022), Jewish Law Students Association; Member, Emory Public Interest Committee

Yeshiva University **New York, NY**
Bachelor of Arts, cum laude, in History May 2020

- Activities: Men's Varsity Soccer Team (2017-2020) and Men's Varsity Baseball Team (2018), NCAA Division III Athletics; Editor, *Chronos: The History Journal of Yeshiva University*
- Honors: Dean's List (2019-2020); Skyline Athletic Conference Honor Roll (Fall 2017, Fall 2018, Fall 2019)

EXPERIENCE

Law Office of the Public Defender, Dekalb County **Decatur, GA**
Intern, Certified Under the Georgia Student Practice Rule May 2023 – Present

- Conduct client interviews in preparation for hearings
- Attend hearings and provide attorneys with written summaries of testimony
- Perform legal research and produce written memoranda

United States District Court for the Northern District of Alabama **Tuscaloosa, AL**
Judicial Intern to the Honorable L. Scott Coogler May 2022 – July 2022

- Researched and drafted opinions for cases involving qualified immunity, motions to compel arbitration, and motions for compassionate release
- Observed plea bargaining, sentencing hearings, probation revocation, discovery hearings, preliminary injunction meetings, and court-conducted mediation
- Attended special presentations conducted by law enforcement officers and attorneys, including in-house corporate counsel

Emory University School of Law **Atlanta, GA**
Research Assistant for Professor Michael J. Broyde May 2022 – August 2022

- Conducted research for, proofread, and edited articles dealing with Jewish Law and religious freedom
- Translated ancient Jewish texts from Hebrew and Aramaic into English

Schoen Law Firm **Atlanta, GA**
Intern January 2021 – June 2021

- Compiled research for cases in Alabama, Florida, and Washington D.C.
- Assisted in formulation of arguments for trials and appeals

Camp Stone **Sugar Grove, PA**
Counselor, Wilderness Program May 2018 – July 2018; May 2021 – July 2021
Head of Junior Campers Program July 2019 – August 2019
Head of Operations Management and Logistics May 2019 – July 2019

ADDITIONAL INFORMATION

- Language Skills: Basic proficiency in Hebrew
- Interests: Baking, volunteering with individuals with special needs, and coaching youth sports

Advising Document - Do Not Disseminate

Name: **Simon Schoen**
Student ID: **2501322**

Institution Info: Emory University
Student Address: 1669 Hillshire Pl NE
Atlanta, GA 30329-3856
Print Date: 05/22/2023

Beginning of Academic Record

Fall 2021

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	505	Civil Procedure	4.000	4.000	B	12.000
LAW	510	Legislation/Regulation	2.000	2.000	B+	6.600
LAW	520	Contracts	4.000	4.000	B-	10.800
LAW	535A	Intro.Lgl Anlys, Rsrch & Comm	2.000	2.000	B+	6.600
LAW	550	Torts	4.000	4.000	B-	10.800
LAW	599A	Professionalism Program	0.000	0.000	S	0.000
LAW	599B	Career Strategy & Design	0.000	0.000	S	0.000

			Attempted	Earned	GPA Units	Points
Term GPA	2.925	Term Totals	16.000	16.000	16.000	46.800
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	2.925	Comb Totals	16.000	16.000	16.000	46.800
Cum GPA	2.925	Cum Totals	16.000	16.000	16.000	46.800
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	2.925	Comb Totals	16.000	16.000	16.000	46.800

Spring 2022

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	500X	Business Associations	3.000	3.000	B-	8.100
LAW	525	Criminal Law	3.000	3.000	B	9.000
LAW	530	Constitutional Law I	4.000	4.000	B-	10.800
LAW	535B	Introduction to Legal Advocacy	2.000	2.000	B+	6.600
LAW	545	Property	4.000	4.000	A-	14.800
LAW	599A	Professionalism Program	0.000	0.000	S	0.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.081	Term Totals	16.000	16.000	16.000	49.300
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.081	Comb Totals	16.000	16.000	16.000	49.300
Cum GPA	3.003	Cum Totals	32.000	32.000	32.000	96.100
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.003	Comb Totals	32.000	32.000	32.000	96.100

Summer 2022

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	901	Supervised Research	3.000	3.000	A	12.000

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Name: **Simon Schoen**
Student ID: **2501322**

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	3.000	3.000	3.000	12.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	4.000	Comb Totals	3.000	3.000	3.000	12.000
Cum GPA	3.089	Cum Totals	35.000	35.000	35.000	108.100
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.089	Comb Totals	35.000	35.000	35.000	108.100

Fall 2022

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	632X	Evidence	3.000	3.000	A-	11.100
LAW	657G	ALR:Mastery-Statutory Legal Rs	1.000	1.000	A	4.000
LAW	675	Constitutional Lit	3.000	3.000	B+	9.900
LAW	732	International Law	3.000	3.000	B-	8.100
LAW	767	Cross Exam. Techniques	3.000	3.000	A-	11.100

			Attempted	Earned	GPA Units	Points
Term GPA	3.400	Term Totals	13.000	13.000	13.000	44.200
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.400	Comb Totals	13.000	13.000	13.000	44.200
Cum GPA	3.173	Cum Totals	48.000	48.000	48.000	152.300
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.173	Comb Totals	48.000	48.000	48.000	152.300

Spring 2023

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	601B	First Amendment:Rel.Freedom	3.000	3.000	B	9.000
LAW	671	Trial Techniques	2.000	2.000	S	0.000
LAW	721	Federal Courts	3.000	3.000	S	0.000
LAW	747	Legal Profession	3.000	3.000	A-	11.100
LAW	830A	SEM: Supreme Ct. Oral Argument	3.000	3.000	B+	9.900
LAW	889	Int'l Law Review:Second Year	2.000	2.000	A	8.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.455	Term Totals	16.000	16.000	11.000	38.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.455	Comb Totals	16.000	16.000	11.000	38.000
Cum GPA	3.225	Cum Totals	64.000	64.000	59.000	190.300
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.225	Comb Totals	64.000	64.000	59.000	190.300

Fall 2023

Program: Doctor of Law
Plan: Law Major

Advising Document - Do Not Disseminate

Name: **Simon Schoen**
Student ID: **2501322**

Course		Description	Attempted	Earned	Grade	Points
LAW	504X	Advanced Appellate Advocacy	3.000	0.000		0.000
LAW	622A	Const'lCrim.Proc:Investigation	3.000	0.000		0.000
LAW	659A	Doing Deals: Contract Drafting	3.000	0.000		0.000
LAW	671A	Trial Practice Advocacy	2.000	0.000		0.000
LAW	764X	Depositions and Discovery	2.000	0.000		0.000
LAW	959	Courtroom Persuasion/Drama I	1.000	0.000		0.000

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	14.000	0.000	0.000	0.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	0.000	Comb Totals	14.000	0.000	0.000	0.000
Cum GPA	3.225	Cum Totals	78.000	64.000	59.000	190.300
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.225	Comb Totals	78.000	64.000	59.000	190.300

Law Career Totals

Cum GPA:	3.225	Cum Totals	78.000	64.000	59.000	190.300
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.225	Comb Totals	78.000	64.000	59.000	190.300

End of Advising Document - Do Not Disseminate

EMORY SCHOOL OF LAW

Michael J. Broyde
Professor of Law and Berman Project Director
Center for the Study of Law and Religion
Director, SJD Program, Emory Law School

June 2023

Re: Letter of Recommendation for Simon Schoen

Dear Judge:

It is my pleasure to write in support of the application for Mr. Simon Schoen for your judicial clerk position. I have known him since he was a young man, as his father is himself a prominent lawyer and a personal friend. Law is in his blood and it shows.

Simon will be an excellent clerk in your chambers. He is an exceptionally hard working and very smart man who worked for me last summer as a research assistant. I would use five ideas to describe his work. (1) He has an excellent work ethic. (2) He produces well done and well thought out work product. (3) He has wonderful research and writing skills. (4) He does his work in a timely way. (5) He is fun and interesting to have around.

I had him as a student in my legal professions class and he was an excellent student. His LSAT score is stellar (174) and he came to Emory with a significant merit scholarship and is on the deans list. He interned for Judge L. Scott Coogler in Alabama in the summer of 2022 and he tells me that this confirmed his interest in clerking. He is also a managing editor of our International Law Journal, a position of both honor and authority.

Let me summarize: Simon would be an excellent law clerk. He is a bright, articulate, and capable individual who demonstrates strong legal skills. He is warm, engaging, and able to communicate effectively with both his peers and members of the faculty. He was a pleasure to work with as he is reliable, always submits work promptly, and is capable of working independently but knows when it is appropriate to seek direction.

I recommend Mr. Schoen for a judicial clerkship position in your chambers strongly and without reservation. If you require further information or have any additional questions, please do not hesitate to contact me.

If you have any questions, please feel free to call me at 404-727-7546 or email me at mbroyde@emory.edu.

Sincerely,

Michael
Michael J. Broyde

Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322-2270
EEO/AA/Disability/Veteran Employer

Tel (404) 727-7546
Fax (404) 712-8605
mbroyde@emory.edu

EMORY LAW

Richard D. Freer
Charles Howard Candler Professor of Law

June 11, 2023

Re: *Clerkship Application of Simon Schoen*

Dear Judge Sanchez:

I am very pleased to recommend Simon Schoen, who is applying to serve as your law clerk following his graduation from this school next May. Mr. Schoen was a student in my Civil Procedure class during his first semester here. In addition, I was the Faculty Advisor on his Comment for the EMORY INTERNATIONAL LAW REVIEW (for which he will serve as Managing Editor next academic year). In those capacities, I have gotten to know Simon quite well. We have also had a chance to discuss his desire to serve as a law clerk. I commend him to you with enthusiasm.

I start by saying something I rarely say: here is a student who, in my opinion, is far stronger than his grades. To be sure, his academic performance has been quite good, as shown by his merit scholarship. I am simply saying that the reality is stronger than the grades. In Civil Procedure, I had many occasions to speak with Mr. Schoen during office hours and after classes. I have no doubt that his understanding and knowledge of the course far exceeded his performance on the examination. This impression was driven home in my work with him on his law review Comment, which dealt with personal jurisdiction and other litigation realities in a sophisticated international context. In my forty years here, I have reached this conclusion with only a handful of students, and Simon is one.

Mr. Schoen is mature and thoughtful, whose interest in clerking is well considered. He recognizes that a clerkship is invaluable training for one hoping to litigate. This sense was confirmed by his Internship with Judge L. Scott Coogler in the Northern District of Alabama. Simon particularly understands that a clerkship will enhance his education and maturation as a young lawyer. His interest in litigation is sincere and augmented by the Trial Techniques program, which he completed this past semester, as well as his taking the Cross-Examination Techniques, Constitutional Litigation, Supreme Court Oral Argument, and Federal Courts courses. And he is working this summer at the DeKalb County Public Defender's Office.

I was very impressed with Simon's law review Comment. I worked intensely with him, from talking about the project through several drafts. The piece, *Congress v. the Courts: American Victims of Overseas Terror's Struggle for Justice,* is well written and persuasive. I was taken with the breadth of his approach. He considered the problem – whether Americans injured abroad in terrorist attacks may sue terrorist organizations in the United States – from a

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remarkable number of angles. This is impressive. He cast a very wide net and, as the paper developed, jettisoned some of the angles; the result was a very well-honed and focused piece of research.

Working with Simon on that paper confirmed what I had gleaned from our interaction in Civil Procedure – that he is delightful person. He has original and innovative insights and enjoys engaging in discussion and debate. He is articulate and absolutely dependable. He responds well to suggestions and is respectful and deliberative. He impresses me as absolutely trustworthy, one who will honor confidences.

Simon is also a well-rounded and broadly engaged young man, as shown by his active membership in the Jewish Law Students Association and Public Interest Committee. He believes strongly in service, as demonstrated by his work with persons with disabilities and with youth in a variety of contexts. I also note that he was an NCAA varsity intercollegiate athlete in soccer and baseball during his outstanding undergraduate career at Yeshiva University. I am always impressed with the discipline and organization displayed by student-athletes, attributes that serve him well in law school and augur well in the profession.

I know the importance of harmony in chambers. Simon, with his unfailingly pleasant, upbeat demeanor, consummate work ethic, sense of humor, and cordial way, would be an outstanding addition to any work environment – substantively and personally.

Again, then, I commend Simon Schoen to you strongly. Please do not hesitate to contact me if I may provide further information.

Sincerely,

June 2023

Honorable Judge:

I am writing in recommendation of Simon Schoen for a clerkship position. For the past eight years I have worked as a Public Defender in Georgia and Colorado. Mr. Schoen is currently working as my intern at the Dekalb Public Defender's Office in Decatur, Georgia. Although I have only had the pleasure of working with Mr. Schoen for a couple of weeks, he has shown himself to be a diligent, thoughtful, and bright young man. I am confident he would be a strong law clerk.

Mr. Schoen has jumped into the fast pace of our office and has already interviewed clients, prepared for upcoming court hearings, composed investigation requests as well as researched specific case issues. Recently, Mr. Schoen was tasked with researching arguments to suppress the search of a cellphone. Because this is a developing area of law in Georgia, Mr. Schoen reviewed caselaw and secondary sources from throughout the country. He was able to quickly digest the information and then clearly and succinctly prepared a memorandum on the issues, which I used directly in my motion to the Court.

It has been a pleasure working with Mr. Schoen these few weeks. He is diligent, professional, and demonstrates a humble intelligence. He is self-sufficient and handles his tasks with little to no oversight, yet he possesses curiosity and forethought to seek guidance at appropriate times. He has completed all assignments timely and consistently communicates his progress. Further, in all his interactions with fellow interns, attorneys, clients, and family members, he has professionally expressed his understanding and opinion. Because Mr. Schoen has his certificate to practice under the Student Practice Act, he will be able to represent clients in their proceedings before the Superior Court. Given all that I have seen from Mr. Schoen so far, I am confident that he will be a strong advocate.

It is a pleasure to recommend Mr. Schoen for a judicial clerkship position in your chambers. He would make a reliable, professional, and skilled clerk capable of both independent work and collaborating with others.

If you require further information or have any additional questions, please do not hesitate to contact me at 678-409-7360 or email me at hcwolfgruber@dekalbcountyga.gov.

Sincerely,

Heidi Wolfgruber

Heidi C. Wolfgruber
Assistant Public Defender
Law Office of the Dekalb County Public Defender

SIMON SCHOEN
1669 Hillshire PL NE, Atlanta, GA 30329
Simon.Schoen@Emory.edu | 404-368-9139

WRITING SAMPLE

Excerpt from Constitutional Litigation assignment. This is my original work product.

Plaintiff's Brief in Support of its Motion for Partial Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment

Written December 2022

Summary of issues involved in the case:

The assignment dealt with a public protest against a marriage display that was placed in a courthouse. After the protest, a police officer tased one of the protesters and deleted pictures from that protester's phone. I was tasked with representing the protester (Cay), the Plaintiff in the case.

Arguments And Citations of Authority

Standard for Evaluating Motions for Summary Judgment

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). For a dispute over a material fact to be "genuine," the evidence must be such that it could cause a reasonable trier of fact to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, all of the facts must be construed in a light most favorable to the nonmoving party, with all reasonable inferences drawn in their favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S 574, 587 (1986).

I. Plaintiff Is Entitled To Injunctive Relief

Plaintiff seeks an injunction to prevent Tallo County from enforcing Code §11 which unconstitutionally restricts the right of citizens to protest publicly.

There are four factors for the Court to evaluate when considering whether an injunction should issue: (1) Whether there is a substantial likelihood of success on the merits; (2) Whether the movant will suffer irreparable harm unless the injunction is issued; (3) Whether the opposing party may be damaged if the injunction is granted; and (4) Whether granting the injunction is in the public interest. *See Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986); *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Plaintiff here meets all four factors and an injunction must be issued. There is no genuine dispute as to any material fact.

a. Plaintiff is Substantially Likely to Succeed on the Merits

Relevant case law compellingly supports the Plaintiff and shows more than a substantial likelihood to succeed on the merits. Defendant Tallo County's Code §11 is unconstitutional. Code §11 requires that "all gatherings of three or more persons, for the purposes of public

protest, must fill out a form and register with the sheriff." Plaintiff, joined by four other co-protestors, gathered on a sidewalk outside the Tallo courthouse to protest the marriage display. They rode bikes, while holding signs, for two hours. There is no genuine dispute as to any material fact.

As an official county ordinance, §11 is a government policy; thereby subjecting Tallo County to litigation under §1983. *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978).

Such ordinances are presumptively unconstitutional as a prior restraint of expression. *Burk v. Augusta-Richmond Cty*., 365 F.3d 1247, 1250-1251 (11th Cir. 2004) (An ordinance requiring a permit for public demonstrations of five or more people deemed a prior restraint of expression by the government); *Bourgeois v. Peters*, 387 F.3d 1303, 1319 (11th Cir. 2004) (it is a prior restraint when the government can deny access before expression occurs). Furthermore, the Plaintiff was in a public forum. *Childs v. Dekalb Cty.*, 286 F. App'x 687, 693 (11th Cir. 2008) (Streets and sidewalks are public forums).

That plaintiff did not fill out a form or register with the sheriff is inconsequential. When a statute gives unbridled discretion to a government official, it can be challenged facially without applying for and being denied a license. *United States v. Frandsen*, 212 F.3d 1231, 1235 (11th Cir. 2000).

b. <u>Plaintiff Will Suffer Irreparable Harm if the Injunction is Not Issued</u>

Clearly, an improper prior restraint upon rights guaranteed by the First Amendment constitutes irreparable harm to any citizen. *See Bourgeois*, 387 F.3d at 1319.

The Eleventh Circuit has held such ordinances as Code §11 to be a prior restraint of expression, because the government can deny access to a forum before expression occurs. *Burk*,

365 F.3d at 1257. Such an ordinance is presumptively unconstitutional and subject to strict scrutiny. *Burk* further noted that even a content-neutral time, place, and manner regulation may not grant unbridled discretion over permitting decisions as it could lead to undetectable censorship. *Burk*, 365 F.3d at 1256. This was further acknowledged in *Bourgeois*, 387 F.3d at 1303; *MacDonald v. City of Chi*., 243 F.3d 1021 (7th Cir. 2001), and *Frandsen*, 212 F.3d at 1231. Code §11 does exactly that. Preventing the exercise of Plaintiff's First Amendment rights here constitutes irreparable harm.

c. Defendant Will Not Suffer Any Damage if the Injunction is Granted

Defendant Tallo County will not suffer any damage if the injunction is granted. Tallo County Code §11 is a content-based law which is presumptively unconstitutional. For a content-based law to survive constitutional scrutiny, the government must have a compelling interest and it must be narrowly tailored. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). No interest is offered by the defense here, but if any interest were to exist, the ordinance certainly is not narrowly-tailored to meet any legitimate, let alone compelling interest. The ordinance only applies to public protests. In our case there were only five protesters on a sidewalk (a public forum) and nothing in the record showing a disturbance of any sort. Yet under the ordinance that is not allowed. There is no harm to the County from failing to enforce an unconstitutional ordinance, while the plaintiff would be irreparably harmed. *See Bourgeois*, 387 F.3d at 1319.

d. Granting the Injunction is Strongly in the Public Interest

It is strongly in the public interest for this Court to grant the injunction. The Ordinance has a direct effect on limiting citizens' First Amendment rights in public forums. As mentioned above, Plaintiff, as well as co-protesters, were on a sidewalk during the protest and therefore were in a public forum. *Childs*, 286 F. App'x at 693. There is also a strong public interest in

protecting the First Amendment and the right to protest, especially concerning an issue like that presented in this case.

II. Defendant Tallo County is Not Entitled to Immunity From Constitutional Damages For Tallo Superior Court Display

Defendant Tallo County stipulates that there was a constitutional violation here. However, it contests liability for such violation.

a. County Policy

Defendant Tallo County is liable under §1983 as a Final Policy Maker. "If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *City of St Louis v Praprotnik*, 485 U.S. 112, 127 (1988). Here, it is clear that Tallo County Commission ratified Judge Sales's decision to accept the marriage display. Ratification is one of the *Monell* theories. *Praprotnik* further expounded it to teach us that it requires three things: (1)After-the-fact approval by someone with policymaking approval; (2) they approved the decision of someone below them in hierarchy; and (3) they approved the reasoning used by that person.

All three requirements are satisfied here. The County Commission passed the resolution granting Sales the decision power over all proposed displays. Further, the County Commission approved the decision to accept the marriage display after-the-fact by giving Sales a plaque and applauding him for his "fine historical analysis." This shows clear approval both of the decision and the basis for it. Therefore, Defendant Tallo County is liable here for loss of constitutional rights and emotional distress.

III. Defendant Jam Is Not Entitled to Qualified Immunity

Government officials in their individual capacity are immune from monetary damages unless the official violated a statutory or constitutional right, and that right was clearly established at the time the act occurred. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

In determining whether a defendant is entitled to a defense of qualified immunity, we use a two-prong analysis. We assess whether the defendant "(1) violated a constitutional right, and (2) that constitutional right was clearly established at the time." *Bradley v. Benton*, 10 F.4th 1232, 1238 (11th Cir. 2021).

"When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon as precedent are important. The facts need not be the same as the facts of the immediate case. But they do need to be materially similar. Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases." *Lassiter v. Alabama A&M Univ.*, 28 F.3d 1146, 1150 (11th Cir. 1994). Further, it must be "clearly established statutory or constitutional rights of which a reasonable person would have known." *Lassiter*, 28 F.3d at 1149.

In our circuit, the law is "clearly established" for qualified imunity purposes by "decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." *Jenkins v. Talladega City Board of Education*, 115 F.3d 821, 827 n.4 (11th Cir. 1997). In addition, some acts are so clearly in violation of a persons rights, that any reasonable person in those circumstances should know that their conduct violates a clearly established constitutional right, even without case law on point. *Jenkins*, 115 F.3d at 828.

Lastly, the Defendant must show that they were acting within the scope of their discretionary duty. *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002). Once Defendant does this, the burden shifts to the Plaintiff to show that qualified immunity does not apply.

Vinyard, 311 F.3d at 1346. Here, Defendant's burden is clearly satisfied. Defendant Jam was in uniform and acting in his role as an officer.

A. **Plaintiff's Clearly Established First Amendment Rights Were Violated**

Plaintiff's First Amendment rights were clearly established here. The Eleventh Circuit has clearly held that there is a First Amendment right to photograph or otherwise note down police conduct on public property. *Toole v. City of Atlanta*, 798 F. App'x 381, 387 (11th Cir. 2019); *Williamson v. Mills*, 65 F.3d 155, 158 (11th Cir. 1995); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Childs*, 286 F. App'x at 697. *See also Irizarry v. Yehia*, 38 F.4th 1282, 1290 (10th Cir. 2022); *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011). As established above, this all occurred in a public forum. *See Childs*, 286 F. App'x at 693.

Furthermore, the Supreme Court and Eleventh Circuit have clearly held that police may not retaliate or demand such photographs or information be deleted, destroyed or turned over to police or seize such things. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (Nieves establishes that there must a but-for that the injury would not have occurred without the retaliatory motive, and there needs to be an absence of probable cause under an objective standard – both of which are satisfied here.); *Toole*, 798 F. App'x at 388. *See also Irizarry*, 38 F.4th at 1288. This is exactly what occurred in our case. These cases demonstrate that the Defendant is not entitled to immunity; moreover, Code §11 so clearly violates the Plaintiff's rights that any reasonable person would have been on notice.

Deputy Jam approached Plaintiff Cay for the sole reason of demanding that Cay delete the photograph that was legally taken, without any probable cause or reasonable suspicion of any illegal activity. Furthermore, Jam went so far as to actually delete the pictures from Cay's phone without permission after taking Cay's phone while they lay on the ground after being tased by

Jam. Therefore, Jam's actions violated clearly established law giving citizens the right to photograph police conduct on public property.

B. **Plaintiff's Clearly Established Fourth Amendment Rights Were Violated**

Plaintiff's Fourth Amendment rights were clearly established here. The Supreme Court and the Eleventh Circuit have unequivocally held that when an officer restrains the freedom of a person to walk away, it is a seizure in violation of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985); *Childs*, 286 F. App'x at 694-695. Defendant Jam seized Plaintiff when Defendant restrained Plaintiff's freedom to walk away. This is clear from the fact that when Plaintiff attempted to walk away, Defendant used a taser to prevent Plaintiff from leaving.

An investigative stop without reasonable suspicion is an unlawful seizure *Childs*, 286 F. App'x at 695. However, brief investigatory stops are allowed when an officer has reasonable articulable suspicion of criminal activity *Bradley*, 10 F.4th at 1239. There was no reasonable articulable suspicion of criminal activity in our case, indeed, none was ever proffered by the Defendant at the time. Therefore, Deputy Jam's seizure of Plaintiff and her constitutionally protected material violated Plaintiff's right against unconstitutional search and seizure under the United States Constitution's Fourth Amendment.

The use of excessive force also violates the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Excessive force is measured by an "objective reasonableness" standard. A court looks at a few different factors: the severity of the crime, the immediate threat to safety of the officers or others, and whether the citizen was resisting arrest or attempting to flee arrest. *Graham*, 490 U.S. at 396; *Fils v. City of Aventura*, 647 F.3d 1272, 1288 (11th Cir. 2011).

Plaintiff had not committed a crime (let alone a severe crime), posed no immediate threat of physical harm to any officer or others, and was not resisting or fleeing arrest, as she was not

being arrested. The 11th Circuit also considers the need for force, amount of force, extent of injury, effort to limit amount of force, threat, and resistance. *Bradley*, 10 F.4th at 1240; *Buckley v. Haddock*, 292 F. App'x 791, 793 (11th Cir. 2008).

Clearly the circumstances show that the tasering was excessive force. There was no crime being committed, real or even alleged. Plaintiff posed no immediate threat to anybody, and Defendant never alleged that Plaintiff posed a threat. Therefore, Jam's seizure of Cay, and use of his taser was in violation of clearly established Fourth Amendment Rights against excessive force.

Applicant Details

First Name	**David**
Middle Initial	**E**
Last Name	**Schulman**
Citizenship Status	**U. S. Citizen**
Email Address	**david.schulman@law.nyu.edu**
Address	**Address** **Street** **60 Sutton Place South** **City** **New York** **State/Territory** **New York** **Zip** **10022**
Contact Phone Number	**917-647-0980**

Applicant Education

BA/BS From	**New York University**
Date of BA/BS	**May 2020**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 17, 2023**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Moot Court Board**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Cardozo BMI Entertainment and Media Law Moot Court Competition (Spring 2022)** **Orison S. Marden Moot Court Competition (Fall 2021)**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kahan, Marcel
marcel.kahan@nyu.edu
_212_ 998-6268

Sexton, John
john.sexton@nyu.edu
212-992-8040

Miller, Arthur
arthur.r.miller@nyu.edu
212-992-8147

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 06, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez:

I am a recent graduate of the New York University School of Law writing to apply for a clerkship in your chambers for the 2024-2025 term. I will be starting this fall as an associate at Sullivan & Cromwell in the litigation group, which will provide me additional practical experience and valuable skills over the next year in order to be an effective clerk. Indicative of my commitment to working hard along with a desire to always learn and improve is how I took on two jobs during my 1L and 2L summers as well as enrolled in max credits with multiple research positions for all of 3L.

I refined my research and writing skills as a research assistant to numerous professors, such as Arthur Miller, John Sexton, and Robert Bauer, as well as for the Institute of Judicial Administration. At NYU, I have served on multiple executive boards and most recently was part of the Student Bar Association on the Student-Faculty Clerkship Committee. Outside of leadership in organizations, I was a member of the Competitions Advocacy and Proceedings divisions of Moot Court Board, where I competed in the BMI Entertainment Moot Court Competition and published a student comment. I also graduated as both a Jacobson Law & Business Scholar and a Student Fellow for the Program on Corporate Compliance & Enforcement. In recognition of my law school achievements and community involvement, I received the Dean John Sexton Prize at Convocation. Overall, I believe my experiences have prepared me to contribute meaningfully to assist your work.

Attached are my resume, law school transcript, and writing sample. My recommendations are from President Emeritus John Sexton and Professors Arthur Miller and Marcel Kahan. The following people have agreed to serve as separate references for my leadership and working abilities:

Dean Emeritus Trevor Morrison
New York University School of Law
(212) 998-6011
trevor.morrison@nyu.edu

Vice Dean Randy Hertz
New York University School of Law
(212) 998-6434
randy.hertz@nyu.edu

Executive Director Allison Schifini
Institute of Judicial Administration
(212) 992-6289
schifinia@mercury.law.nyu.edu

Please let me know if I can provide any additional information. Also, please note that my 1L spring was interrupted by Covid approximately two weeks before exams since no formal mention is on my transcript.

Thank you very much for your time in considering my candidacy.

Respectfully,
/s/
David Evan Schulman

DAVID E. SCHULMAN

♦ (917) 647-0980 ♦ david.schulman@law.nyu.edu ♦

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
J.D., May 2023
Honors: Moot Court Board (journal equivalent), Competitions Advocacy & *Proceedings* Staff Editor
Jacobson Law & Business Scholar; Corporate Compliance & Enforcement Student Fellow
Dean John Sexton Prize (2023 Convocation Recipient)
Activities: T.A. – President John Sexton's Religion and Government Seminar (Fall 2022 - Cancelled)
T.A. – Professor Arthur R. Miller's Civil Procedure (Fall 2021)
Recent College Graduate Mentors, Co-Chair; Law & Business Association, Events Chair
IP & Entertainment Law Society, Networking & Development Co-Chair
Social Enterprise & Startup Law, Finance Chair
Student Bar Association, Clerkship Committee Student Rep. (previously First Year Rep.)

NEW YORK UNIVERSITY COLLEGE OF ARTS AND SCIENCE, New York, NY
B.A. with High Honors in English and American Literature, *magna cum laude*, May 2020
Minors: Social & Public Policy and Child & Adolescent Mental Health Studies
Senior Thesis: *Law and Literature: Legal Fiction Set in the Civil Rights Era*
Honors: *Phi Beta Kappa*; *summa cum laude* Departmental Honors; Presidential Honors Scholar
Evan Chesler Prelaw Scholar; University Honors Scholar/Founder's Day Award
Activities: Order of Omega, Vice-President; College Cohort Leader (selected by NYU to mentor freshman)

EXPERIENCE

ROBERT BAUER, New York, NY July 2022 – Present
Research Assistant. Assisting with writing project on political reform and the role of ethical choices in politics. Helping Profs. Patrick Stewart and Bauer in connection with ALI working group on election official code of conduct.

U.S. ATTORNEY'S OFFICE, SOUTHERN DISTRICT OF NEW YORK, New York, NY January 2023 – April 2023
Law Student Extern – Public Corruption Unit. Drafted a search warrant. Assisted with research and trial strategy. Attended various proffer and cooperation meetings as well as trial motions. Reviewed evidence for investigations.

JOHN SEXTON & ZALMAN ROTHSCHILD, New York, NY September 2022 – May 2023
Research Assistant. Assisting with law review articles on the First Amendment's Religion Clause.

PROGRAM ON CORPORATE COMPLIANCE AND ENFORCEMENT, New York, NY August 2022 – May 2023
Associate Editor of Compliance & Enforcement. Soliciting, editing, and posting pieces on various corporate topics.

SULLIVAN & CROMWELL LLP, New York, NY May 2022 – July 2022
Summer Associate. Worked on matters concerning Financial Institutions, Antitrust, Securities, Class Actions, etc.

ARTHUR R. MILLER, New York, NY June 2021 – January 2022
Research Assistant. Updated treatise on F.R.C.P. 46 – 50. Assisted with his hornbook on topic of Issue Preclusion.

INSTITUTE OF JUDICIAL ADMINISTRATION, New York, NY June 2021 – August 2021
Summer Fellow/Research Assistant for Oral History Project. Drafted contracts. Researched and edited interviews.

TD SECURITIES (USA), New York, NY June 2019 – August 2019
Compliance Summer Analyst. Created regulatory matrix on all business lines for Chief Compliance Officer. Assisted with low-priced security reports for Anti-Money Laundering. Created compliance manuals/documents.

ADDITIONAL INFORMATION

Published five law-related articles as an undergraduate (list available upon request). Volunteer with SciTech Kids, NYDM, and NYC Parks. Switch-hitting baseball player, avid skier, and left-handed golfer. Enjoy racquetball, tennis, and reading science fiction and fantasy novels. Member of the ABA, Phi Alpha Delta, and Phi Delta Phi.

Name: **David Evan Schulman**
Print Date: **06/05/2023**
Student ID: **N12150361**
Institution ID: **002785**
Page: **1 of 2**

New York University
Beginning of School of Law Record

Degrees Awarded

Bachelor of Arts 05/20/2020
College of Arts and Science
Honors: magna cum laude
Major: English and American Literature with high honors
Minor: Child and Adolescent Mental Health Studies
Minor: Social and Public Policy

Fall 2020

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Christopher B Jaeger			
Criminal Law	LAW-LW 11147	4.0	B
Instructor: Erin Murphy			
Torts	LAW-LW 11275	4.0	A-
Instructor: Barry E Adler			
Procedure	LAW-LW 11650	5.0	A
CR/F grade option allowed due to extenuating circumstances: original professor's health issue required a series of alternating class sessions by professor and two other professors.			
Instructor: Arthur R Miller			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: The Supreme Court			
Instructor: Trevor W Morrison Alison J Nathan			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2021

School of Law
Juris Doctor
Major: Law

Property	LAW-LW 10427	4.0	B
Instructor: Katrina M Wyman			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Christopher B Jaeger			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B
Instructor: Samuel J Rascoff			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Liam B Murphy			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Trevor W Morrison Alison J Nathan			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2021

School of Law
Juris Doctor
Major: Law

Corporations	LAW-LW 10644	5.0	A-
Instructor: Marcel Kahan			
Quantitative Methods Seminar	LAW-LW 10794	2.0	A-
Instructor: Daniel L Rubinfeld Katherine B Forrest			
Regulation of Banks and Financial Institutions	LAW-LW 11550	4.0	B+
Instructor: Michael Ohlrogge			
Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0	CR
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Arthur R Miller			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	B+
Instructor: Samuel Issacharoff Arthur R Miller			
Issues in SEC Enforcement Seminar	LAW-LW 10386	2.0	A-
Instructor: Walter Ricciardi			
Advanced Trial Simulation	LAW-LW 11138	2.0	A-
Instructor: David R Marriott Evan R Chesler			
Antitrust & Regulatory Alternatives I	LAW-LW 11348	3.0	B
Instructor: Harry First			
Criminal Securities and Commodities Fraud Seminar	LAW-LW 12117	2.0	B+
Instructor: Raymond Joseph Lohier, Jr. Steven Peikin			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	57.0	57.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Law and Business Projects Seminar	LAW-LW 10236	1.0	A-
Instructor: Gerald Rosenfeld Helen S Scott Robert Jackson			
Business Crime	LAW-LW 11144	4.0	A-
Instructor: Jennifer Hall Arlen			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A-
Instructor: John P. Cronan			
Constitutional Law	LAW-LW 11702	4.0	A-
Instructor: Kenji Yoshino			
Religion and the First Amendment	LAW-LW 12135	2.0	A-
Instructor: Schneur Z Rothschild John Sexton			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: John Sexton			
Iconic Delaware Cases Seminar	LAW-LW 12785	2.0	A-
Instructor: Edward Baron Rock Matthew J Mallow Travis Laster			

	AHRS	EHRS
Current	16.0	16.0
Cumulative	73.0	73.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Law and Business Projects Seminar	LAW-LW 10236	1.0	A-
Instructor: Gerald Rosenfeld Robert Jackson			
Law and Business Projects Seminar: Writing	LAW-LW 10346	1.0	A-

Name:	**David Evan Schulman**
Print Date:	**06/05/2023**
Student ID:	**N12150361**
Institution ID:	**002785**
Page:	**2 of 2**

Credit

Instructor: Gerald Rosenfeld			
Moot Court Board	LAW-LW 11553	0.0	CR
Federal Courts and the Federal System	LAW-LW 11722	4.0	A-
Instructor: Helen Hershkoff			
Law, Economics and Journalism Seminar	LAW-LW 11989	2.0	B+
Instructor: Barry E Adler Paul M Barrett			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: John Sexton			
Government Anti-Corruption Externship	LAW-LW 12769	3.0	A
Instructor: Rachel Salem Pauley Jennifer Rodgers			
Government Anti-Corruption Externship Seminar	LAW-LW 12770	2.0	A
Instructor: Rachel Salem Pauley Jennifer Rodgers			
Third Party Investment in Litigation: Law, Policy and Practice Seminar	LAW-LW 12782	2.0	A
Instructor: Anthony Sebok			

	AHRS	EHRS
Current	16.0	16.0
Cumulative	89.0	89.0

Staff Editor - Moot Court 2021-2022
Competitions Advocacy Editor - Moot Court 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

New York University
A private university in the public service

School of Law
Faculty of Law

40 Washington Square South, Room 332
New York, New York 10012-1099
Telephone: (212) 998-6268
Facsimile: (212) 995-4692
Email: marcel.kahan@nyu.edu

Marcel Kahan
George T. Lowy Professor of Law

June 13, 2022

RE: David Schulman, NYU Law '23

Your Honor:

I am writing to recommend David Schulman for a clerkship with you. I am particularly pleased to write this letter.

I know David from the Corporations class he took with me in the fall of 2021. It was a large class, with over 80 students. But despite the class size, David made a lasting impression. His comments were thoughtful and insightful; they showed good judgment, maturity, a high level of analytical skill. Consistent with his superior class participation, David wrote a very good final exam. He received an A- grade, missing the cutoff for an A by a single point.

David is also a strong writer. In college, David concentrated in English and American literature. At law school, he serves as an editor on the Moot Court Board. In the context of writing this letter, I reviewed a brief David wrote for a moot court competition and it is excellent.

Although I had no direct experience working with David, I have on several occasions talked to him after class or during my office hours. I believe that David is conscientious and responsible, has a pleasant personality, and will be easy to work with. In short, David would make an outstanding clerk and I recommend him highly and without reservation.

If I can do anything else to be of assistance, please feel free to call or write me.

Sincerely,

Marcel Kahan
George T. Lowy Professor of Law

June 06, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in support of the candidacy of David Schulman for a clerkship in your chambers.

I first met David at an NYU Law School Admitted Students event in 2020. After the event, David followed up immediately, initiating a correspondence that continued during the summer. We discussed not only legal education but also baseball (in Summer 2020 I was drafting a book on baseball and the law and David shared with me his personal statement for his law school applications, which also was on baseball and the law), and the increasing Covid mandates.

During our initial meeting and the subsequent email exchanges, David expressed a hope that he would be assigned to my Civil Procedure section; however, he was assigned to one of my faculty colleagues who, coincidentally, was my Civil Procedure professor at Harvard Law School. In Fall Term 2020, in order to comply with Covid health and safety guidelines while still providing some in-person interaction between students and professors, NYU Law School employed a hybrid teaching method, whereby one-third of the students in each IL section attended in person while the remaining two-thirds participated remotely. The groups rotated each third class meeting so that all students had an equal number of in-person and remote experiences. While David originally was in a different Civil Procedure section (and on a different rotation), my faculty colleague who was teaching David's section sustained a serious injury and was unable to continue teaching, so David's section was folded into mine mid-way through the Fall Term. Therefore, it was in this difficult hybrid learning environment, compounded by a change of professor mid-way through the term, that I came to know David as an active and engaged learner.

Despite this challenging situation, David excelled; indeed, based on his outstanding performance in Civil Procedure, he was selected as a Teaching Assistant for Civil Procedure in Fall 2021 (where, coincidentally, he was the Teaching Assistant to my son, who entered law school that Fall). David said he enjoys mentoring and teaching others, and he takes seriously the responsibility to enhance the experiences of others. David also was selected as a Research Assistant for both Professor Arthur Miller and for the Institute of Judicial Administration. David framed these experiences in terms of "learning beyond the classroom," and he seized the opportunity to develop even closer relationships with his TA and RA colleagues.

In addition to the classes I teach at the Law School, I also teach an advanced undergraduate seminar on the Relationship of Government and Religion. Focusing on sixteen words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …", the seminar uses as its course material in excess of 1,000 pages of unedited United States Supreme Court opinions. In the first half of the term we investigate the Establishment Clause, while in the second half we examine the Free Exercise clause. David embraced both the philosophy and demands of the seminar. In Fall Term 2020 the seminar was conducted remotely and, in spite of a rigorous 1L course load, David asked if he could observe the seminar. He developed a friendship with the Teaching Assistant for the seminar, and he consistently expressed how much he enjoyed observing the small group experience and how the robust discussion in the seminar broadened not only his understanding of Constitutional Law but also his perspective on teaching methods.

As much as David has a profound commitment to his academic life, he is equally engaged in the life of the law school community. He was elected as his section's IL Representative to the Student Bar Association, where he immediately joined the Student Life & Spirit and Communications committee. As a 2L, he was elected Proceedings Staff editor for the Moot Court. He also is a member of the Campus Climate and Bias Committee, which works with Student Affairs on integral issues of equity and diversity within the law school. David also was the SBA representative on a working committee on possible grade reform. In each of these capacities and many others, he has emerged as a natural leader.

Throughout all these experiences and accomplishments, David and I have remained in regular contact: indeed, David served as my Teaching Assistant last Fall for the undergraduate seminar he first observed in Fall Term 2020.

Finally, I feel compelled to address David's performance in Spring Term 2021. Unfortunately, David had a severe Covid infection just prior to his final exams. Due to the unusual nature of the 2020-2021 academic year and its Covid mandates, he had the option to take his classes pass/fail but he chose the graded option. Despite his best efforts, he was unable to write his exams at a level which reflects his preparation and potential.

I have known David since he was admitted to NYU Law as his mentor, professor, and as my teaching colleague (when he served as my Teaching Assistant). In all of these aspects and from different perspectives, he consistently and thoughtfully considers law and displays a genuine joy in learning. He also cares deeply about and has a demonstrated commitment to the members of his communities. For all these reasons, it is my pleasure to write in support of his candidacy.

Sincerely,
John Sexton

John Sexton - john.sexton@nyu.edu - 212-992-8040

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Arthur R. Miller
University Professor

«DateForLetter»

«The_Honorable» «Full_Name»
«Court_General»
«Court_Specific»
«Address 1»
«Address 2»
«Address 3»
«City», «State» «Zip» «COUNTRY»

RE: «Student»

Dear «Salutation» «Last_Name»:

I am writing on behalf of David Schulman, who is applying for a position as your clerk following his graduation from the New York University School of Law in the Spring of 2023. Based on Mr. Schulman's first-year classroom and examination performance, I invited him to be one of my full time research assistants for the summer following his first year. He also was in my Complex Litigation course last Spring and was a teaching assistant for my civil procedure course in the fall of his second year.

As a research assistant Mr. Schulman edited and updated certain portions of the annual supplementation of sections related to federal civil procedure Federal Rules 46 through 50 in the multivolume Wright and Miller Federal Practice and Procedure treatise. In addition he helped update the Civil Procedure hornbook I coauthor, particularly the material related to those rules. This was part of the effort to produce a new edition. In the course of working on these projecte, Mr. Schulman did a considerable amount of research, editing, and writing, much of which required a great deal of thought, writing ability, legal analysis, and judgment on his part.

David's research and writing was excellent. His work product was complete and sound, indicating considerable mental ability, a good command of research techniques, good writing, and organizational skills. He also was able to master several aspects of federal civil procedure, some of which are complex. He worked on several topics that were outside the first year procedure course and difficult for someone with only one year of law school. He writes clearly and logically with an good sense of structure and idea sequence.

«The_Honorable» «Full_Name»
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David is bright, thoughtful, analytically sound, and takes instruction and direction well. He also is constantly aware of the value of professional improvement. Mr. Schulman is a very helpful person by nature. He is conscientious and assisted other researchers to get things done. David's work always was done in timely fashion, with care and attention to detail. He understood fully the professional character and utility of his work. He is curious about issues, both legal and non-legal. I consider David to have been a reliable research assistant.

Mr. Schulman has a solid commitment to the law as a profession. I have no doubt about his seriousness in terms of long-term career development. I am certain he will do well with his law firm experience at Sullivan & Cromwell this summer following his second year of law school. David is a likable and good-natured individual; he has a pleasant personality and is a good conversationalist. I thoroughly enjoy his company, even though a good deal of it, has been virtual. He is mature, broad gauged in his outlook, fields of interest, and is very much interested in the world around him.

On the basis of my experience with him, David should fit in well in the collegial environment of a judge's chambers. He worked effectively with the other researchers the summer he spent with me and that should be true with regard to working with you and your other clerks and staff. I believe he can perform whatever tasks you ask of him.

If I can be of any further assistance to you with regard to David, please do not hesitate to communicate with me.

Sincerely,

Arthur R. Miller

David Schulman Writing Sample

The below writing sample comes from the 2022 BMI Entertainment and Media Law Moot Court Competition hosted by Cardozo Law School. I have included the summary of the argument that was co-written by my partner and I for purposes of context and then the portion I wrote by myself, which demonstrates my analytical ability and was answering the second question of the competition on the retroactive application of the CLASSICS Act. To comply with the 15-page limit, I have edited out portions of the analysis.

SUMMARY OF THE ARGUMENT

The CLASSICS Act is constitutional and correctly applies to Gregory Pop's song, "San Antonio Fever." This Act fixes the discrepancy between pre-1972 and post-1972 sound recordings exclusive rights at the federal level, properly preempting state law, in order to finally give pre-1972 authors the fair right to be properly compensated for their work for the first time.

Pop's song is rightfully restored from the public domain. The public domain is not owned by the public, but rather simply freely accessible by all. The CLASSICS Act's restoration of works that never had the chance to be truly commercialized by their owners restores balance between the utilitarian goal of societal progress with the economic incentive of the individual. As restoration is only available to sound recordings which meet copyright eligibility, these restored sound recordings are considered original works. Additionally, congressional purpose in creating pay parity for artists and in aligning the states with a uniform scheme for pre-1972 sound recordings rights is both rational and constitutionally within the Copyright Clause's mandate.

The CLASSICS Act is meant to be applied in a retroactive manner and does not violate Respondent's due process rights. Congress devised the statute with a clear intention of targeting

contracts like the one between Pop and Duncan and for the Act to go into immediate effect once enacted. The goal of the CLASSICS Act is to modernize copyright law by remedying the lack of copyright protections for artists of pre-1972 sound recordings given how the music industry has evolved with technology, particularly with the use of digital streaming. This is the clear and reasonable congressional purpose, which this Court should follow. The CLASSICS Act is economic legislation and thus given a presumption of constitutionality, which means for Duncan's claims to succeed, he must pass a very high bar of congressional irrationality.

This Court should find the CLASSICS Act constitutional and retroactive application not in violation of Respondent's due process rights as to find in favor of Respondent would contradict this Court's past precedent and previous statutory and constitutional interpretations.

ARGUMENT

II. POP IS ENTITLED TO ROYALTIES AND DAMAGES SINCE A RETROACTIVE APPLICATION OF THE CLASSICS ACT IS NOT A VIOLATION OF DUNCAN'S DUE PROCESS RIGHTS.

The U.S. Constitution's Copyright and Patent Clause grants Congress the power to promote the progress of science and useful arts by securing for limited times to authors the exclusive right to their work. U.S. Const. art. 1 § 8, cl. 8. Such a clause provides Congress the ability to create a federal copyright statute that provides copyright owners with the exclusive rights to distribute, reproduce, or publicly perform their works. Copyright owners can also license out their creative works for others to use, such as how Pop did with Duncan in the case at bar. If such an "exclusive right" is violated, the copyright owner is entitled to institute an action for copyright infringement under § 501(b). 17 U.S.C. § 501(b). The CLASSICS Act states,

> Anyone who . . . before the last day of the applicable transition period . . . and without the consent of the rights owner, engages in covered activity with respect to a sound recording fixed before February 15, 1972, shall be subject to the remedies provided in sections 502 through 505 . . . to the same extent as an infringer of copyright . . . . 17 U.S.C. § 1401(a)(1).

Since Duncan has continued to use "San Antonio Fever" in his digital public performances after the passage of the Act, Pop rightfully contends he is entitled to royalties and damages.

Even though Duncan and Pop had entered into a contract concerning reproduction rights of "San Antonio Fever" three years before the Act was signed into law, the Act can still now govern over Duncan's use of the song. The CLASSICS Act can be applied retroactively to contracts made before the passage of the Music Modernization Act. Although the retroactive application of laws can bring up issues of due process, there is no such concern here. *See* Harrington, Matthew P., "Symposium: Retroactivity of Law: Foreword: The Dual Dichotomy of Retroactive Lawmaking," (1997) 3 ROGER WILLIAMS U. L. REV. 20 [hereinafter "Symposium: Retroactivity"] (. . . "[T]here is always some controversy attending the promulgation of a legal rule that might affect past transactions or relationships."). While criminal cases may be far sterner in restricting retroactive laws, in the civil context, Congress has the unequivocal ability to legislate both prospectively and retrospectively. *See* U.S. Const. art. 1 § 9, cl. 3 (prohibiting ex post facto laws); *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1179 (2d Cir. 1977) (. . . "[N]or is the ex post facto law provision of the Constitution applicable to other than criminal statutes."); Symposium: Retroactivity ("The Supreme Court has been surprisingly rigid in its approach to retroactive legislation in the criminal context."). While this Court still has the judicial power to constitutionally review any act, it has generally found a presumption of constitutionality when dealing with economic legislation. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) ("[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . one complaining of a due process violation [has] to establish that the legislature has acted in an arbitrary and irrational

way."); Symposium: Retroactivity ("Where economic legislation is concerned, however, the Court has been quite lenient in permitting a great deal of retroactivity.").

Additionally, Duncan's right to due process was not violated simply because his reliance on the contract has changed. While states cannot create laws which abridge its citizens contractual obligations, Congress does have just such authority. U.S. Const. art. 1 § 10, cl. 1. Although a private relationship may be altered by federal action, this does not automatically mean that the party negatively impacted has had their due process rights infringed upon. Congress has the power to change private contracts through legislative action without a presumption of due process violation. *See Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) ("[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."). Moreover, Duncan's lack of formal notice regarding the effect of the CLASSICS Act on his contract with Pop does not make such legislative action completely unforeseeable nor does it make the CLASSIC's Act retroactive application too large a hindrance.

As such, the District Court for the District of Cardozo properly held that the CLASSICS Act should apply retroactively to this contract since the Copyright Clause "empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause." *Eldred*, 537 U.S. at 222. Copyright legislation especially is usually given deference by courts. *Id.* at 188. Thus, this Court should reverse the Court of Appeals for the Thirteenth Circuit and apply the Act retroactively as the clear Congressional intention of providing royalties to aging, pre-1972 artists is a rational basis for the economic legislation, which does not violate Duncan's due process rights.

A. Congress has the Power to Legislate Both Prospectively and Retroactively and Since the CLASSICS Act has a Rational Basis for Retroactive Application, There is no Due Process Violation.

Some laws are only able to be applied prospectively as to apply them retrospectively would be unconstitutional. However, Congress still has the power to enact retroactive laws, especially regarding economic legislation. If the legislation applying retroactively is not "particularly 'harsh and oppressive' then it does not offend due process rights." *R.A. Gray & Co.*, 467 U.S. at 733 (internal citations omitted). Mathematical precision of inequality is not necessary nor is the mere fact that there is now "some inequality" an instant bar to retroactivity. *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 167 (1980).

1. The CLASSICS Act is a piece of economic legislation and thus is given a presumption of constitutionality.

Economic legislation by Congress is presumed to be constitutional. *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 451 (1988); *see also Sheridan Square P'ship v. United States*, 66 F.3d 1105 (10th Cir. 1995) ("Although the Due Process Clause places more stringent constraints upon the retroactive reach of Congress . . . we . . . favor retroactive economic legislation with a presumption of constitutionality and uphold such legislation unless the challenging party proves it to be arbitrary or irrational."). When economic legislation is applied retroactively, a due process challenge means the law is reviewed under a rational basis test. *R.A. Gray & Co.*, 467 U.S. at 729.

The CLASSICS Act is a piece of economic legislation as fundamentally all legislation that concerns wealth, businesses, and contracts is categorized as such. Tax, retirement benefit, and employee disability benefit laws are examples of laws categorized as economic legislation and which have been challenged due to their retroactive application. *See United States v. Carlton*, 512 U.S. 26 (1994) (tax); *R.A. Gray & Co.*, 467 U.S. at 717 (retirement benefits);

Usery, 428 U.S. at 1 (employee disability benefits). The CLASSICS Act provides copyright-like protections to pre-1972 artists and allows them to earn royalties from digital streaming. Just like tax or retirement laws, Congress wanted to change the economics of copyright and so a presumption of constitutionality is to be applied to the CLASSICS Act. Since there is a presumption of constitutionality, Duncan has a high burden to overcome in showing that there is no rational basis for this Act or that Congress acted in an arbitrary manner. *See Usery*, 428 U.S. at 15. The increase in cost to Duncan caused by paying Pop more is simply not at the "harsh and oppressive" level needed to negate retroactivity. Likewise, the argument that Pop's potential power to deprive Duncan of digitally streaming "Fun Guy" will be too great is an insufficient claim to make the Act unconstitutional.

2. The legislative history of the CLASSICS Act clearly demonstrates that Congress intended for the act to apply to contracts like the one between Pop and Duncan.

"[W]here the congressional intent is clear, it governs." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990). Previous congressional actions regarding copyright provide further evidence that the CLASSICS Act is to be applied retroactively. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 122 (2000) (*"*"Congress' actions in this area have evidenced a clear intent").

The CLASSICS Act is clear that it is meant to protect the interests of pre-1972 sound recording artists. Both the Senate and House bills of the Act state the exact same phrase,

> Anyone who, prior to February 15, 2067, performs publicly by means of digital audio transmission a sound recording fixed before February 15, 1972, without the consent of the rights owner, shall be subject to the remedies provided in sections 502 through 505 to the same extent as an infringer of copyright." CLASSICS Act, S. 2393, 115th Cong. (2018), https://www.congress.gov/bill/115th-congress/senate-bill/2393/text; CLASSICS Act, H.R. 3301, 115th Cong. (2018), https://www.congress.gov/bill/115th-congress/house-bill/3301/text.

Duncan's usage of "San Antonio Fever" clearly falls under such a provision.

Moreover, statements made by Congress and individual congressmen are incredibly important in helping this Court understand the purpose of the Act. *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 202-07 (1979). "According to the House Report, the purpose of the CLASSICS Act is to assist 'older artists who have highlighted the negative impact upon their ability to survive economically as they increasingly enter their retirement years.'" Mary LaFrance, *Music Modernization and the Labyrinth of Streaming*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 310 (2018) (quoting from H.R. Rep. No. 115-651, at 15 (2018)) (reporting on one of the MMA's predecessor bills, H.R. 5447, 97th Cong. (1983)). At seventy-seven, Pop is an older artist near retirement and is one who has unfortunately never had the commercial success that Duncan is now experiencing. The House Report also details how the CLASSICS Act will not be an unjustifiable impediment to the music industry or to artists like Duncan. On the difference between pre-1972 and post-1972 sound reocrdings, the House writes,

> Despite this discrepancy, in royalties payable for works, the Committee recognizes that music services have been able to successfully operate while paying royalties for post-72 works. Thus, the Committee believes that these same services should be able to continue to successfully operate with a statutory requirement to pay royalties for pre-72 works to enable older artists and their families to benefit financially from their creativity. H.R. Rep. No. 115-651, at 15 (2018).

Congress thus considered the impact of the law's retroactivity and still saw it fit to implement the Act in such a manner since the "same services," would "be able to continue to successfully operate." *Id.* The fact that the CLASSICS Act had unanimous support in both the House and Senate also further showcases Congress' unequivocal intent here.

A co-sponsor's words on an Act are especially instructive since they helped introduce it. *Lewis v. United States*, 445 U.S. 55, 63 (1980) ("Inasmuch as Senator Long was the sponsor and floor manager of the bill, his statements are entitled to weight."). Senator Orin Hatch, a co-sponsor to the MMA, stated after the bill's passage, "Our music licensing laws are convoluted, out of date and don't reward songwriters fairly for their work. They've also failed to keep up

with recent, rapid changes in how Americans purchase and listen to music." Randy Lewis and Randall Roberts, *Music industry hails passage of the Music Modernization Act*, L.A. Times, (Oct. 11, 2018, 2:35 PM), https://www.latimes.com/entertainment/music/la-et-ms-music-modernization-act-20181011-story.html; *See also* Congressional Record Senate Articles (2022), https://www.congress.gov/congressional-record/2018/09/18/senate-section/article/S6259-5 (detailing further comments by Senator Hatch on the Music Modernization Act). Senator Hatch's unambiguous declaration demonstrates the Act's purpose of applying retroactively.

Finally, any concern over the music industry giving pushback is unfounded as the Senate directly received the industry's support of the CLASSICS Act. During a Senate Judiciary Committee Hearing regarding the MMA, the President of the Recording Industry Association of America (RIAA), Mitch Glazier stated that he agreed with a characterization by famous, older artist Smokey Robinson regarding the gap in copyright laws on pre-1972 artists' protections before this Act's passage. He stated that the CLASSICS Act would correct a "quirk in the law" and close the "loophole" that Senator Hatch and others recognized in creating the bill. Protecting and Promoting Music Creation for the 21st Century: Hearing Before the Com. on the Judiciary, 115 Cong. 10 (2018) (Statement of Mitch Glazier). Since the RIAA's members consists of record labels and distributors, this organization is representative of the many organizations currently paying royalties to artists. Glazier's statement demonstrates the RIAA's support for providing artists like Pop with their long-awaited copyright-like protections and royalty payments for digital streaming.

3. Statutory interpretation evinces further retrospective intent.

Statutory construction can determine whether an Act is to be applied retroactively. *Litton Sys., Inc. v. Am. Telephone and Telegraph Co.*, 746 F.2d 168, 174 (2d Cir. 1984). Plain meaning,

or "textualism," is the dominant mode of statutory construction in the federal courts. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008) (holding that plain meaning prevails).

The text of the statute designates "Anyone" is subject to the CLASSICS Act and then explicitly adds specific exceptions for "certain authorized transmission and reproductions." 17 U.S.C. § 1401(a)-(b). Anyone is defined as "any person at all." *Anyone*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/anyone (last visited Feb. 20, 2022). Duncan qualifies under this plain meaning of anyone, and he does not fall under the carve outs of the statue. In addition to "anyone," the statute further specifies that any new copyright protection of pre-1972 songs would end on or before February 15, 2067. 17 U.S.C. § 1401(a)(2)(B)(iv). This aspect of the Act was Congress's way of creating an explicit time limit on any new artist's obligations to the legacy artist for use of a pre-1972 sound recording. Combining the plain meaning presented here with the whole text, the CLASSICS Act can be read as retroactively applying to the contract between Duncan and Pop. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

It is also proper to rely upon the title of the act in elucidating statutory purpose. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 221 (2012) (titles and headings canon); *INS v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text."). The CLASSICS Act stands for the Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society Act. and naming the legislation in this manner was a direct way for Congress to showcase its objective for the act.

As such, if this Court were to rule for anything but for retroactive application, such a holding would then go against the direct purpose of the Act and an absurd result would ensue. *See* SCALIA & GARNER, at 234 (2012) (absurdity doctrine). The Act has a clear goal of compensating aging, legacy artists who are near retirement and unable to make money from touring. S. Rep. No. 115-16, 339, at 17–18 (2018). To disregard the entire reason the CLASSICS Act was enacted and deem its application to be only prospective would mean that Pop and the thousands of artists like him would either have to fight to amend their existing contracts or hope that a new artist now decides to use their sound recording in order for them to make any money from digital streaming. As the District Court stated, "Where absurd results would follow, such a finding will not be found by the judiciary." (R. at 15).

B. Duncan's Reliance Interests are Not Unconstitutionally Undermined by Retroactive Application of the CLASSICS Act.

While some laws may have a grace period built in before it is fully enacted, there is no such required standard for Congressional legislation. In the case of the CLASSICS Act, the date it was enacted was the day its effects were intended to apply. As such, as of October 11th, 2018, pre-1972 artists are owed royalties for digital streams of their sound recordings. Even though Duncan and Pop's contract was formed in 2015, it is Duncan's continued use of digital streams for "Fun Guy" after 2018 that now requires proper royalty payments to Pop. Duncan has argued that his reliance interest in the contract would be unconstitutionally violated by a retroactive application of the CLASSICS Act (R. at 16, 30), but federal regulation of private rights cannot be negated simply because they alter a contractual agreement. *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947) ("So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts."). Given the

rational goal of closing the loophole that existed in copyright law before the CLASSICS Act, there is no doubt that such legislation was done for the common good. As stated in *Nebbia v. People of New York,* the use of property and making of contracts may be private matters and thus are generally free of government interference, "[but] neither property rights nor contract rights are absolute . . . Equally fundamental with the private right is that of the public to regulate it in the common interest." 291 U.S. 502, 523 (1934). "History reveals an unbroken congressional practice" where copyright extensions were granted to existing copyrights retroactively, with no notice given, and on the effective date of enactment despite the impact such legislation had on private parties. *See Eldred* 537 U.S. at 200; *See, e.g.*, *id*. at 237 (Stevens, J., dissenting) ("To be sure, Congress, at many times in its history, has retroactively extended the terms of existing copyrights and patents.").

Additionally, there is no evidence that the "CLASSICS Act provides remedies for Pop to deprive Duncan of the use of this music in its present form entirely." (R. at 30-31). While it is unknown to what extent Pop and Duncan attempted to renegotiate their contract after the passage of the CLASSICS Act, it can be reasonably assumed that Pop would be willing to negotiate with Duncan given their past contract. Since private contracts can and have been altered by Congress, the claimed violation of rights that would occur if Duncan now has to pay digital streaming royalties pales in comparison to the true injustice of not properly compensating Pop.

1. Private contracts are within the domain of congressional regulation and can be altered if there is a rational basis for such impairment of expectations.

Although citizens' property rights are protected, Congress has the power to impose new constraints on the way those rights are used or to condition their continued retention on certain affirmative duties. *United States v. Locke*, 471 U.S. 84, 104 (1985). If a legitimate legislative objective is being furthered by imposing new duties or constraints upon the continued usage of

the private property, then the restriction is allowable. *Id*. Due Process does not guarantee that the freedom to contract is absolute and Congress, in its constitutional right to regulate commerce, can alter private agreements if the impact is not unreasonable. *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 558 (1937); *See Norman v. Baltimore & O.R. Co.*, 294 U.S. 240, 307–08 (1935) ("Contracts . . . cannot fetter the constitutional authority of . . . Congress. Contracts may create rights of property, but . . . [p]arties cannot remove their transactions from the reach of dominant constitutional power . . . .").

Duncan argues that his reasonable expectations and interests in the use of "Fun Guy" and his contractual expectations for the use of "San Antonio Fever" would be "unfairly depriv[ed]" if this Court were to hold that the CLASSIC Act applies retroactively. (R at 11). However, reliance interests do not create a shield that prevents Congressional action from altering any such expectations. In *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, this Court stated, "When the contract is . . . private . . . [A] due process violation must overcome a presumption of constitutionality and 'establish that the legislature has acted in an arbitrary and irrational way.'" 470 U.S. 451, 472 (1985) (internal citations omitted). In that case, private railroads sued on due process grounds, challenging the requirement of the Rail Passenger Service Act of 1970 (RPSA), as amended, to reimburse Amtrak. *Id*. at 458. While Congress did not specify how to calculate such costs, it did give the Interstate Commerce Commission (ICC) the power to determine the payments if Amtrak and railroads were unable to agree on price. *Id.* at 459. The ICC then set the rate of pay from 1972 to 1979. *Id*. In 1979, however, Congress decided without any notice that these payments were inadequate compensation and enacted legislation, which forced the railroads to prospectively reimburse Amtrak and at a higher rate. *Id*. While the Seventh Circuit deemed this payment scheme to have violated the Due Process Clause because

the new payment requirement "unreasonably and illegally impaired the rights of the railroads under the [private contracts]," this Court held the opposite as there was no "private contractual right to not pay more" and since Congress' rationale was "neither arbitrary nor irrational," there was no due process violation. *Id.* at 464, 476-77.

In both *Na'l R. R. Passenger Corp.* and in this case, Congress enacted new legislation requiring private parties, the railroads and Duncan, respectively, to pay more than their previous contractual obligations had delineated. While Duncan and Pop may not have expected Congress to finally provide pre-1972 artists with digital streaming copyright-like protection when they had originally contracted, the same can be said of the change for the railroads and Amtrak. Just as such unexpected changes did not negate the legislation's impact on the agreement there, the same should be held here. Given the clear and reasonable congressional purpose of updating copyright law and providing monetary relief to legacy artists, no irrationality defense can be claimed. As in *Nat'l R.R. Passenger Corp.*, Duncan is not protected under the Due Process Clause from having to pay more simply because he did not envision this possibility.

2. It would not be a manifest injustice for Duncan to pay royalties.

Since a rational basis is needed for retroactive laws, notice is not necessary to prevent unfairness. *Carlton*, 512 U.S. at 34 ("[W]e do not consider . . . lack of notice . . . to be dispositive . . . In *Welch v. Henry,* the Court upheld the retroactive imposition of a tax despite . . . [no] advance notice . . . ."). However, the general trend of federal copyright law and recent technology innovation does provide some basis of notice for the CLASSICS Act. *See* Copyright Act of 1976, 17 U.S.C. §§ 101-1332 (2022) (containing all relevant Acts and amendments such as the original Copyright Act of 1976, the Copyright Renewal Act of 1992, the Sonny Bono Copyright Term Extension Act, the Digital Millennium Copyright Act, and the impact of the

Berne Convention and the Uruguay Round Agreements Act); *see also R.A. Gray & Co.*, 467 U.S. at 718 ("It is doubtful that retroactive application of the MPPAA would be invalid under the Due Process Clause even if it was suddenly enacted without any period of deliberate consideration."). When the nature and identity of the parties are not changed, the overarching nature of their rights not altered, and the impact of the change is purely monetary, no manifest injustice has occurred. *See Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 717 (1974).

As Professor Brauneis writes, ". . . [I]t has been widely known that whenever Congress has extended copyright term, it has done so retroactively, granting the benefit of the extension to all works still under copyright on the effective date of the extension." *A Brief Illustrated Chronicle of Retroactive Copyright Term Extension*, 62 J. COPYRIGHT SOC'Y U.S.A 479 (2015). Thus, Duncan cannot claim to have no knowledge of the federal laws nor be ignorant about how technology and the music industry has evolved. He knew he had to sign a contract with Pop to use "San Antonio Fever," which demonstrates he understood that using the recording would not be for free. (R. at 5). Similarly, Duncan placed his music on digital streaming services because he knew such platforms were lucrative. *See Id.* Since "Fun Guy" has become an instant hit, it has not only "played on every radio station," but also "surpassed 100 million streams on Spotify, and had a Tik-Tok dance dedicated to it." *Id.* This mainstream commercial success has been capitalized upon by Duncan, and the CLASSICS Act has set out to make sure Pop gets his fair share of money for the use of his original song. Duncan will continue to make profits off the song even while paying Pop, so neither the parties involved, nor the nature of their rights are substantially altered. The major change, which is the crux of the Act, is that Pop will now be compensated fairly for the use of his song. To hold otherwise would be a manifest injustice *not*

to Duncan, but to Pop, especially since he has never been publicly credited for the use of "San Antonio Fever" and the digital streams are what catapulted Duncan into the global spotlight. *Id*.

Furthermore, within the context of copyright, this Court is not being asked to provide Pop with a novel remedy of retroactive damages. Instead, this Court should apply one of its more recent rulings to the current situation. In *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, this Court unanimously stated that "[u]pon registration of the copyright, however, a copyright owner can recover for infringement that occurred both before and after registration." 139 S. Ct. 881, 886–87 (2019). There, as is occurring here, the lawsuit was for copyright infringement and involved a private contract between the two parties. Although *Fourth Est.*'s holding applies most directly to registration timing, the Court held that the remedy to be provided is from infringement onward. Duncan's illegal conduct here is quite analogous to that which took place in *Fourth Est.* as the infringement here has occurred before Pop could apply for copyright-like protections and now after he has been given such rights. Since Pop has complied with the CLASSICS Act's scheduling requirements, he is "eligible to recover statutory damages and/or attorneys' fees for the unauthorized use of Pre-1972 Sound Recordings." 17 U.S.C. § 1401(f)(5)(A). As such, this Court's rationale in *Fourth Est.* should be applied to the current situation, which means Pop would be paid royalties starting from 2018 onward. Just as the Court did not believe such a remedy to be unjust in that case, it would not be unfair for Duncan to pay more royalties in this case.

Note: Conclusion edited out to comply with page limits

Applicant Details

First Name	**Rachel**
Last Name	**Schwartz**
Citizenship Status	**U. S. Citizen**
Email Address	**rs1946@georgetown.edu**
Address	**Address** Street **225 Eastern Parkway, #1C** City **Brooklyn** State/Territory **New York** Zip **11238** Country **United States**
Contact Phone Number	**9176978155**

Applicant Education

BA/BS From	**Northwestern University**
Date of BA/BS	**June 2013**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 23, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Journal of Legal Ethics**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Wolfman, Brian
wolfmanb@georgetown.edu
Matheny, Caitlin
cmatheny@sidley.com
212-839-5460
Super, David
das62@georgetown.edu
202 525 9132

This applicant has certified that all data entered in this profile and any application documents are true and correct.

RACHEL H. SCHWARTZ
225 Eastern Parkway #1C, Brooklyn, NY 11238 | rs1946@georgetown.edu | 917-697-8155

June 11, 2023

The Honorable Chief Judge Juan R. Sanchez
U.S. District Court for the Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street, Courtroom 14-B
Philadelphia, PA 19106

Dear Judge Sanchez,

I am a 2021, *cum laude* graduate of Georgetown University Law Center, and I am writing to apply for a term clerkship in your chambers. My two years as a litigator at Sidley Austin have given me valuable experience that will make me an excellent clerk. Additionally, my five years of post-college, pre-law-school work experience in the nonprofit sector; over 120 hours of pro bono legal services throughout law school; substantial experiential education almost every semester of law school I was permitted; and summer legal internships give me the professional and legal experience to be a vital part of your chambers' team.

I have attached my resume, transcript, and writing sample. My references are:

Brian Wolfman
Georgetown University Law Center
202.661.6582
wolfmanb@georgetown.edu

David Super
Georgetown University Law Center
202.661.6656
david.super@law.georgetown.edu

Caitlin Matheny
Senior Counsel
GE Aerospace
347.415.2276
caitlinnmatheny@gmail.com

Please let me know if I can provide additional information. Thank you for your consideration.

Respectfully,
Rachel Schwartz

Rachel H. Schwartz

225 Eastern Parkway #1C, Brooklyn, NY 11238 | rs1946@georgetown.edu | 917-697-8155

EDUCATION

Georgetown University Law Center, Washington, D.C. May 2021
J.D., *cum laude*, Special Pro Bono Pledge Recognition, Section 3
GPA: 3.65
Journal: Georgetown Journal of Legal Ethics (Executive & Submissions Editor)
Clinic: Appellate Courts Immersion Clinic (Spring 2020)
Activities: Public Interest Fellow; Jewish Law Student Association (Executive Member-at-Large); Lawcappella, A Cappella Group (Vice President; Soprano)

Northwestern University, Chicago, IL June 2013
B.A., *magna cum laude*, philosophy and psychology
GPA: 3.84
Honors: Phi Beta Kappa; Dean's List; Philosophy Honors; Brady Scholar in Ethics and Civic Life
Thesis: Philosophy, *Agreeing to Disagree: A Defense*
Awards: Weinberg Summer Research Grant, Philosophy Thesis Research; Tikvah Summer Fellow in Jewish Thought, Princeton University

EXPERIENCE

Sidley Austin LLP, Associate, New York, NY Nov. 2021–Present
- Took two and second chaired three depositions, drafted discovery demands, negotiated with opposing counsel, managed calendar for civil-rights case on behalf of prisoner held in solitary confinement for a decade
- Member of trial team for a billion-dollar, three-week trial; wrote real-time trial updates, conducted factual and legal research, prepared exhibit binders
- Researched and drafted comprehensive client memos on personal-jurisdiction, attorney-client and work-product privilege
- Drafted bankruptcy-court complaint on behalf of debtor that led to a favorable settlement

Mobilization for Justice Low Income Tax Clinic, Sidley Pro Bono Fellow, New York, NY Sept.–Nov. 2021

Sidley Austin, Summer Associate, New York, NY July 2020

ACLU, Extern, Project on Freedom of Religion and Belief, Washington, D.C. Sept.–Dec. 2019
- Conducted legal and factual research for Supreme Court briefs and other cases

The Legal Aid Society, Summer Intern, New York, NY May–Aug. 2019
- Advocated for clients from intake to judgment, preventing evictions and correcting housing violations

Rosov Consulting, Project Associate, Chicago, IL June 2016–July 2018
- Guided strategic planning for nonprofits by evaluating programs, analyzing findings, writing reports, presenting results

Interfaith Youth Core (IFYC), Campus Assessment Associate, Chicago, IL July 2013–May 2016
- Coordinated campus climate surveys, wrote reports, stewarded strategic data use on 25+ college campuses

PRO BONO AND VOLUNTEERING

Federal Public Defender for D.C., Part-Time Summer Intern, Appeals (Washington, D.C., May 2020–June 2020)
Washington Lawyers' Committee, Workers' Rights Clinic Intake Volunteer (Washington, D.C., 2019–2020)
Crisis Text Line, Volunteer Crisis Counselor (Chicago, IL, 2014–2018)
One Northside, Volunteer Mental Health Justice Organizer (Chicago, IL, 2013–2018)

Bar Admission: New York, S.D.N.Y., N.D.N.Y., 2022

Interests: Jogging, singing, windowsill gardening, vegetarian cooking

Record of: Rachel Schwartz
GUID: 828779224

Course Level: Juris Doctor

Degrees Awarded:
Juris Doctor Jun 09, 2021
Georgetown University Law Center
Major: Law
Honors: Cum Laude

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2018							
LAWJ	001	93	Legal Process and Society Lawrence Solum	2.50	IP	0.00	
LAWJ	002	93	Bargain, Exchange & Liability David Super	3.00	IP	0.00	
LAWJ	005	30	Legal Practice: Writing and Analysis Jessica Clark	2.00	IP	0.00	
LAWJ	007	32	Property in Time Sherally Munshi	4.00	A-	14.68	
LAWJ	009	35	Legal Justice Seminar David Luban	3.00	B+	9.99	

	EHrs	QHrs	QPts	GPA
Current	7.00	7.00	24.67	3.52
Cumulative	7.00	7.00	24.67	3.52

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2019							
LAWJ	001	93	Legal Process and Society Lawrence Solum	5.00	B	15.00	
LAWJ	002	93	Bargain, Exchange and Liability Part II: Risks and Wrongs David Super	6.00	A	24.00	
LAWJ	003	93	Democracy and Coercion Allegra McLeod	4.00	A-	14.68	
LAWJ	005	30	Legal Practice: Writing and Analysis Kristen Tiscione	4.00	B+	13.32	
LAWJ	008	93	Government Processes Jonathan Molot	4.00	A-	14.68	
LAWJ	611	01	Restorative Justice Thalia Gonzalez	1.00	P	0.00	

Dean's List 2018-2019

	EHrs	QHrs	QPts	GPA
Current	24.00	23.00	81.68	3.55
Annual	31.00	30.00	106.35	3.55
Cumulative	31.00	30.00	106.35	3.55

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	1433	05	Law and Religion Stephanie Inks		NG		
LAWJ	1433	81	Law & Religion~~Sem Stephanie Inks	2.00	A-	7.34	
LAWJ	1433	82	Law & Religion~~Field Work Stephanie Inks	2.00	P	0.00	
LAWJ	1497	05	Urban Law and Policy Seminar Sheila Foster	3.00	A	12.00	
LAWJ	165	07	Evidence Gerald Fisher	4.00	A-	14.68	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Randy Barnett	4.00	B+	13.32	
LAWJ	514	05	Introduction to Scholarly Note Writing Jessica Wherry	1.00	P	0.00	

Dean's List Fall 2019

	EHrs	QHrs	QPts	GPA
Current	16.00	13.00	47.34	3.64
Cumulative	47.00	43.00	153.69	3.57

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	049	05	Appellate Courts and Advocacy Workshop Brian Wolfman	2.00	P	0.00	
LAWJ	504	05	Appellate Courts Immersion Clinic Brian Wolfman		NG		
LAWJ	504	30	~Writing Brian Wolfman	4.00	P	0.00	
LAWJ	504	80	~Research and Analysis Brian Wolfman	4.00	P	0.00	
LAWJ	504	81	~Advocacy & Client Relations Brian Wolfman	4.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	14.00	0.00	0.00	0.00
Annual	30.00	13.00	47.34	3.64
Cumulative	61.00	43.00	153.69	3.57

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	121	07	Corporations Charles Davidow	4.00	A-	14.68	
LAWJ	1461	05	Race and Poverty in Capital and Other Criminal Cases Seminar Stephen Bright	2.00	A	8.00	
LAWJ	1601	01	Constitutional Impact Litigation Practicum (Project-Based Practicum) Joshua Geltzer	5.00	A-	18.35	
LAWJ	1631	05	Federal Practice Seminar: Contemporary Issues Irving Gornstein	2.00	A-	7.34	
LAWJ	361	02	Professional Responsibility Peter Tague	2.00	A-	7.34	

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Rachel Schwartz
GUID: 828779224

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	55.71	3.71
Cumulative	76.00	58.00	209.40	3.61

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1322	05	Civil Rights Statutes and the Supreme Court Seminar	2.00	A-	7.34	
	Irving Gornstein						
LAWJ	135	05	Law Firm Economics and the Public Interest	1.00	P	0.00	
	Steven Schulman						
LAWJ	1512	05	Constitutional Litigation and the Executive Branch	2.00	A	8.00	
	Joshua Matz						
LAWJ	1606	08	Motherhood and the Law Seminar	2.00	A	8.00	
	Stephanie Inks						
LAWJ	1652	05	Criminal Justice II: Criminal Trials	3.00	P	0.00	
	Michael Gottesman						
LAWJ	178	09	Federal Courts and the Federal System	3.00	A	12.00	
	Kevin Arlyck						

Dean's List Spring 2021

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	13.00	9.00	35.34	3.93
Annual	28.00	24.00	91.05	3.79
Cumulative	89.00	67.00	244.74	3.65

End of Juris Doctor Record

GEORGETOWN LAW

Brian Wolfman
Professor from Practice
Director, Appellate Courts Immersion Clinic

May 22, 2023

Re: Clerkship recommendation for **Rachel Schwartz**

I recommend Rachel Schwartz to serve as a law clerk in your chambers.

I got to know Rachel in the spring semester of 2020 when she was a student-lawyer in the Appellate Courts Immersion Clinic at Georgetown University Law Center. (I am the clinic's director.) The clinic handles complex appeals in the federal courts of appeals and in the Supreme Court. Students act as the principal lawyers researching and writing briefs under my supervision.

The clinic operates full-time. Students take no classes other than the clinic and a co-requisite seminar about the law of the appellate courts. (I'll comment on Rachel's work in the seminar toward the end of this letter.) I worked with Rachel every day for an entire semester—in-person until the Covid-19 crisis and then remotely—and was able to observe her as a judge would observe a law clerk or as a senior lawyer might observe a close associate. This letter, therefore, is based not on one exam, a handful of comments in class, or even a few meetings, but on an intensive, day-to-day working relationship.

I'll start with my bottom line: Rachel would be an excellent law clerk. Rachel's work in the clinic was quite strong. She analyzes legal problems well. She's a very good writer and an even better editor. She's a terrific colleague too.

I'll turn now to Rachel's major clinic projects: researching and drafting both opening and reply briefs in a one federal appeal and doing the same for an answering brief in another federal appeal.

In the first case, Rachel and another student researched and drafted a brief arguing that our client's Section 1983 employment-discrimination suit (1)

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PHONE 202-661-6582 FAX 202-662-9634
wolfmanb@law.georgetown.edu

had been adequately pleaded, and (2) was not issue-precluded by an earlier judgment. The first issue was quite difficult because the question was not whether the *factual* allegations were adequate (the typical pleading problem), but what if any obligation exists to plead the *legal* bases for one's claims. The second question—issue preclusion—was even trickier, and Rachel did a fine job researching and thinking through the difficulties of the doctrine. These were issues that law students never confront, and Rachel was called on to think a bit outside the box. She rose to the occasion. Rachel did an excellent job with the reply brief as well. She had to turn this brief around quite quickly and at the end of the semester when she was working on another opening brief and coping with the strains of virtual law practice. Yet, she did a fine job responding to our opponent's arguments without losing the basic themes we had established in our opening brief.

Rachel's second project was equally challenging. We represent a prisoner claiming that his Free Exercise rights had been violated by the prison's failure to provide religiously appropriate meals. He had successfully resisted summary judgment on the prison officials' claims of qualitied immunity. On appeal, we argued both the merits of the qualified-immunity issue and that the court of appeals lacked appellate jurisdiction over the district court's non-final order. Once again, the issues presented were not the kind normally confronted by law students in the classroom. Rachel had to learn a couple areas of the law from the ground up. Again, she did fine job, producing a brief that was analytically strong and well-written.

* * *

As noted at the top, students in my clinic are enrolled in a separately assessed seminar—the Appellate Courts and Advocacy Workshop. The first two-thirds of the course is an intensive review of federal appellate courts doctrine, including the various bases for appellate jurisdiction and the standards and scope of review. In this part of the course, the students must master the difficult doctrine and apply it in a half-dozen writing assignments that range from a motion to dismiss for lack of appellate jurisdiction to a statement of the case to a complex jurisdictional statement. We then take a short detour into Supreme Court jurisdiction and practice. Toward the end of the course, we cover a few advanced legal writing and appellate advocacy topics. Only capable students willing to work hard do well in this course. Given the course's subject matter and its blend of doctrine, writing, and practice, the course often appeals to students who desire federal judicial clerkships. Rachel's work in this class was consistently excellent. In light of Covid-19, our school switched to mandatory pass-fail grading, and so I did not grade Rachel in this

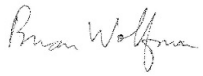
course (or in the clinic). But by the time the virus hit, and we had switched to pass-fail grading, I had assessed all but one of the seminar's writing assignments. I can tell you that the quality of Rachel's work was right at the top of the class.

* * *

Beyond Rachel's intellectual attributes, a few of her other qualities bear mention. Rachel is a serious advocate who is dedicated to her client's interests. She's honest and straightforward. She works hard. She has a lovely personality and a fine sense of humor. And, importantly, she is willing to challenge others, politely but firmly, when she believes that they need to think harder or more deeply about an issue. Not infrequently, Rachel saw problems or opportunities in cases that I or others had missed, and I appreciated her willingness to bring those things to our attention. She did this not to score points, but to ensure that we did the best job for our clients. For this reason as well, I think she'd be a fine person to have in chambers.

I'll end where I started: I recommend Rachel Schwartz for a clerkship. If you would like to talk about Rachel, please call me at 202-661-6582.

Sincerely,



Brian Wolfman

June 10, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to provide my strongest recommendation for Rachel Schwartz for a clerkship with you. I am a Senior Managing Associate at Sidley Austin LLP in the Commercial Litigation and White-Collar practice groups. I served as a Staff Law Clerk on the United States Court of Appeals for the Seventh Circuit for a two-year term. I have directly supervised Rachel on three client matters, which is effectively one-third of my work over the past year. Rachel is the best first-year associate (now second-year) that I have worked with in my over four years at the firm.

It is hard for me to put into words what makes Rachel superior, as often she does the job so effectively that she is handling the matter with little oversight from me. Rachel has all the skills that a judicial clerk should have. She researches and writes effectively, communicates complex topics in an easy-to-understand manner, has excellent time-management skills, and she is a professional who would represent the Court with integrity.

First, Rachel has an exceptional ability to write legal motions and memoranda based on the thorough legal research she conducts. This skill, alone, would be sufficient to make her stand out in your pool of applicants. But I particularly admire her ability to edit others' written work. She is excellent at reorganizing and restyling drafts she receives from others, such as those we receive from expert witnesses, more junior attorneys, or even from attorneys senior to her. Rachel's ability to understand and help clarify legal arguments would assist the Court in getting to the heart of legal issues efficiently.

Unlike many other clerkship applicants, Rachel's experience in a wide-variety of litigation matters compared with her peers has taught her how to look at litigation at a high-level and understand the complete picture. As a result, she has learned to drive case strategy, appropriately presenting and assessing the risks and benefits of a course of action. The ability to view facts and understand how they affect the entirety of a litigation often takes associates longer to grasp, but Rachel learned it right away. For example, while writing discovery requests, Rachel analyzed the claims that we will need to prove to win and determined which documents and testimony our client would need to prosecute his case. This allowed her to understand and ultimately press opposing counsel during meet-and-confer conferences for the production of documents most essential to our case, and to have the wherewithal to know which ones we could afford to compromise. She took this approach into depositions, and recently took a significant role in drafting a settlement demand. Her view of the full-scope of litigation enabled her to assess which positions we could afford to demand in settlement, and which ones we might initially include, but again, will ultimately drop.

Rachel understands how the Court's decisions affect litigants and lawyers. The practical skills I have watched her learn, that those with a strictly academic pedigree may be missing, would make her a unique asset to your chambers.

Another one of Rachel's strengths is her ability to stay calm and not become overwhelmed by new or complex tasks. For a variety of reasons, each matter that Rachel has worked on with me has been staffed leanly. This means that Rachel has had to take the first attempt at assignments that someone more senior would usually lead, or that a junior associate would do only a small part of. Rachel has always handled the assignments with ease and viewed each experience with a positive attitude, as a chance to add more litigation tools to her belt.

For example, on one matter, Rachel was tasked with hiring expert witnesses. She researched, provided recommendations to narrow the pool of expert witnesses from approximately twenty candidates, and interviewed those potential experts. The litigation team took Rachel's recommendation, and Rachel hired, and worked with the experts to write two subject-matter reports supporting our client. On the same matter, Rachel recently took depositions of two defendants. She reviewed discovery produced, wrote deposition outlines, and questioned the defendants successfully all within one month. Rachel took the depositions in a methodical fashion and was unafraid to ask tough follow-up questions to her witnesses based on newly revealed and unexpected information. In this matter, and another matter we worked on together, Rachel has led meet-and-confer conferences, each time successfully securing firm positions from opposing counsel.

Next, Rachel has better management skills than even some senior lawyers I know. I have seen her excel at delegating to other associates, paralegals, and summer associates. She is exceptional at discerning legally-imposed deadlines and then creating and managing project calendars to meet them. Rachel is also efficient in managing her own time. She prioritizes her tasks effectively, produces excellent work, and knows when the work product is finished. But where Rachel shines is in "managing up." She is unapologetic about following up, and keeping an entire matter moving. She is also unafraid to proactively give and solicit feedback, which makes her own work, and the work of everyone around her, better. Rachel is in her second-year as an attorney and I think she is better at this than I am, and I have been practicing for seven years.

I would also like to highlight Rachel's intellectual curiosity, love of the law, and integrity. She goes above and beyond on any research assignment, not only answering the question asked but seeing the holes in an argument, or predicting the next questions, and providing an answer for those, too. Rachel genuinely delights in finding the answers to complex legal issues across subject areas, and she is excellent at it.

Caitlin Matheny - cmatheny@sidley.com - 212-839-5460

Last, Rachel sticks to deadlines, keeps her promises, communicates before deadlines if she thinks more time would be beneficial to the work product while still keeping the matter on track, and I trust her without fail. In short, she would represent the Court with integrity. I know that if Rachel gives me work product, I need not check whether her statements or research is accurate (although I do).

For all these reasons, it would be bittersweet for me, and our firm, to lose Rachel, even if temporarily, to a clerkship. Rachel makes me a better lawyer, and I strongly recommend her for a clerkship with you.

Kind regards,

Caitlin Matheny

Caitlin Matheny - cmatheny@sidley.com - 212-839-5460

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

September 2022

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am most happy to recommend Rachel Schwartz for a clerkship in your chambers. She was a bright, accomplished and hard-working student, she is proving an engaged, energetic lawyer, and she will make an excellent law clerk.

I came to know Ms. Schwartz because she enrolled in the year-long course I teach in Georgetown's alternative curriculum that combines Contracts and Torts. This is a demanding and sometimes disorienting program, organized quite differently from the way either course is taught on its own. Even many students that eventually do quite well struggle mightily in the beginning. Not Ms. Schwartz. She had the intellectual ability to handle everything that the course threw at her and the commitment to hard work to give meticulous attention to the heavy readings assigned. The organization of this course diverges from those of standard Contracts and Torts courses to the point that commercial outlines are of little value to students; Ms. Schwartz is such a dedicated student that I doubt she would have bothered with one anyway.

I gave exams at the end of each semester. Many students' performance varies consider-ably from one to the other. Again, Ms. Schwartz was the conspicuous exception, writing stand-out responses to both. I am sure I could have made the exams twice as difficult and it would not have phased her in the least.

Although Ms. Schwartz in no way neglected her coursework, even in her first year she was developing much broader interests in the law. In particular, she was interested in the intersection between public and private regulation, a timely topic on which I have written as well. With my encouragement, she made several appointments to discuss how our system allocates responsibilities between Tort and various regulatory regimes. Whenever I would mention a case or article, even casually, she would invariably have read it by our next meeting and formed a nuanced opinion about it. Having such sophisticated conversations with a graduating third-year student would have been impressive; doing so with a first-year student was remarkable. We continued to talk throughout her law school career; she sought my comments on a fascinating note she wrote on how landlord-tenant law, various municipal ordinances, and conditions on federal funding shape housing quality in New York City.

I have stayed in touch with Ms. Schwartz occasionally since her graduation. I am most impressed with how enthusiastically she has taken to litigation. She takes her duties to her clients and to the courts very seriously and so conveys few details, but she clearly is fascinated by the process and relishing being a part of it. This enthusiasm and curiosity will make her a superb clerk even when the tasks at hand might strike some as less than scintillating.

More broadly, Ms. Schwartz has all the skills required to be an excellent law clerk. She is a strong writer, she has superior legal research skills, she is a hard worker and imposes higher standards on her own work than any supervisor would ever impose on her. She reacts positively to criticism and disagreement. She has impressive maturity, poise, and self-confidence without allowing her considerable talents to kindle any arrogance or carelessness. And she is a courteous and pleasant human being. I expect your staff will enjoy having her in chambers.

In sum, Rachel Schwartz is an impressively talented, hard-working, and quite adaptable lawyer. She will excel as a law clerk and give all of her mentors numerous occasions for pride as she sets out on a most promising legal career. Her applications has my full and unreserved support.

Sincerely yours,

David A. Super
Carmack Waterhouse Professor of Law and Economics

David Super - das62@georgetown.edu - 202 525 9132

RACHEL H. SCHWARTZ
225 Eastern Parkway #1C, Brooklyn, NY 11238 | rs1946@georgetown.edu | 917-697-8155

Writing Sample

The attached writing sample is a Motion to Dismiss I wrote for a seminar called *Appellate Courts and Advocacy Workshop*. Based on only the limited set of caselaw given to us, we were assigned to examine whether the Sixth Circuit had jurisdiction to hear the appeal of a decision refusing to certify a class settlement. I argued on behalf of the Intervenors-Appellees that it did not.

The Motion is my own work. I wrote it independently after class discussions of Supreme Court caselaw about appellate jurisdiction under 28 U.S.C. §§ 1291-1292. The only feedback I got on it included one round of light margin-comments from my professor after I submitted it. I edited the Motion based on those comments and my own judgment with no help from others.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Polly Shipler; Billy Andrews; Walter Wong; Rita Jones; and all others similarly situated, Plaintiffs-Appellants, v. Cardio Products, Inc., Defendants-Appellants Grace Brown; Sheila Piercy; Marge Millett; George Wideman; and John Will, Intervenors/Class Members-Appellees.	No. XXXX Hon. XXXX, J.

Intervenors-Appellees' Motion to Dismiss

Twenty-nine-thousand recipients of pacemakers manufactured by Cardio Products, Inc. sued Cardio for damages because its pacemakers were dangerously defective. A few months later the parties reached a settlement, but the district court found it inadequate and refused to approve it. Cardio and the class of pacemaker recipients appealed the district court's denial of their settlement, but several class members, Intervenors-Appellees Grace Brown, Sheila Piercy, Marge Millett, George Wideman, and John Will, now move to dismiss this appeal for lack of appellate jurisdiction.

This Court should grant the class members' motion and find appellate jurisdiction lacking because the district court's decision does not conclusively resolve an issue that is

separate from the merits of the action, and it is effectively reviewable on appeal from a final judgment.

Factual and procedural background

Most people who have pacemakers undergo surgery every three years to replace a part of the device called the pulse generator. R. at 239 (Mem. Op. and Order 239). Cardio Products, Inc. marketed a new kind of pacemaker, advertising that its pulse generator would need to be replaced only every fifteen years. *Id.* For the convenience and savings in medical care its updated model would afford, Cardio charged ten times more money than most other models cost. *Id.* at 240 (Mem. Op. and Order 240).

As has now been established, Cardio's claim was far from true; its pacemakers provided no advantage over existing models. *Id.* Cardio's false advertising was discovered only once a series of pacemaker failures resulted in emergency surgeries and even death. *Id.* These emergencies prompted a change in protocol for recipients of Cardio's pacemaker, requiring yet unharmed recipients to undergo pacemaker upkeep surgery every three years—the same frequency as those with other types of pacemakers, and five times as often as they bargained for. *Id.*

In August of 2016, 29,000 Cardio pacemaker recipients filed a class complaint seeking three things: reimbursement for the difference in price between what they paid for the pacemaker and what they would have paid if its marketing had accurately reflected its capabilities; reimbursement for future medical care; and pain and suffering. *Id.* The class also

sought punitive damages on the grounds that Cardio knew or should have known that its pacemaker would not last more than three years and because it used false data to trick the FDA into approving it. *Id.* at 240-41 (Mem. Op. and Order 240-41).

Only four months later, on December 1, 2016, and after only minimal discovery the parties reached a proposed settlement that included a shadow of what the class sought in its complaint—that Cardio would pay for future medical care associated with replacing pacemaker devices. *See id.* at 241 (Mem. Op. and Order 241). Still, the district court preliminarily approved it and certified the class for settlement purposes only. *Id.*

About 300 class members timely filed written objections to the fairness of the settlement. *Id.* at 241-42 (Mem. Op. and Order 241-42). At the hearing, the class members argued that the settlement was unfair for two reasons: First, they argued it was unfair because two of the three pacemaker-related cases that had been tried to verdict against Cardio resulted in verdicts for over three million dollars including lost wages and punitive damages in addition to the cost of future medical care. *Id.* at 242 (Mem. Op. and Order 242). Second, they argued it was unfair to California residents, where about twenty percent of the class lives, because a California state court had overruled all of Cardio's legal defenses. *Id.*

In response, Cardio argued that its statute of limitations defense had been successful in two states and that the settlement provided sufficient prospective damages. *Id.* Class counsel responded by arguing on the one hand that the settlement adequately compensated members for emotional distress by easing their worry about medical expenses. *Id.* On the other hand, it argued that even though the settlement was inadequate as to some class members, the

settlement was a good compromise because it would achieve the greatest good for the greatest number of class members. *Id.*

On August 7, 2017, the district court denied class counsel and Cardio's motion to approve the settlement, holding that the relative strength of the parties' positions on the merits demonstrated that the settlement was not "fair, adequate, and reasonable." *Id.* at 242-43 (Mem. Op. and Order 242-43). Because most class members are elderly, the court observed, the cost of future medical care would not sufficiently compensate them for the years of unbargained-for pain as a result of buying a product that fell short of its description. *Id.* As for younger class members who are still working, the settlement would not compensate them for lost wages and other consequential damages. *Id.* at 243 (Mem. Op. and Order 243). Finally, the court took issue with the fact that the settlement provided no damages whatsoever, either compensatory or punitive. *Id.* The court decertified the settlement class and set a schedule to move toward trial. *Id.* Cardio and class counsel timely appealed. *Id.* at 245 (Mem. Op. and Order 245).

Argument

I. This Court should dismiss this appeal for lack of jurisdiction because the district court's refusal to approve the class settlement is not appealable as a collateral order.

Because the district court's refusal to certify the class settlement does not end the action for any party and does not meet the criteria for interlocutory appeal under 28 U.S.C. §§ 1292, the most plausible ground on which this Court could find jurisdiction is the final

judgment rule of 28 U.S.C. § 1291 and the collateral order doctrine. *Cohen v. Beneficial Indus. Loan, Corp.*, 337 U.S. 541, 546-47 (1949); *Wedding v. Univ. of Toledo*, 89 F.3d 316, 318 (6th Cir. 1996). The collateral order doctrine interprets the final judgment rule to mean that on rare occasions appellate courts have jurisdiction over appeals of important decisions that, though they do not end the action, are separate from the merits of the action and would not be effectively reviewable on appeal from a final judgment. *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *Cohen*, 337 U.S. at 546.

This Court has understood there to be three elements to the collateral order doctrine. *Wedding*, 89 F.3d at 318-19 (quoting *Johnson v. Jones*, 515 U.S. 304, 310 (1995)). The appealed order must (1) be conclusive, (2) resolve an issue that is separate from the case's merits, and (3) be unreviewable on appeal from a final judgment. *Id.* Whether these elements apply to the resolution of a particular claim is irrelevant in the inquiry of whether an order is a collateral order; what matters is whether these elements apply to the category of claims to which it belongs. *Cunningham v. Hamilton County*, 527 U.S. 198, 204 (1999); *Dig. Equip.*, 511 U.S. at 868. Because there is only one relevant and controlling case in the Sixth Circuit [for the purposes of this class assignment], Supreme Court and other circuits' precedent is instructive in applying these factors.

1. The district court's order is not conclusive.

To be conclusive, an order must be the final word on the subject addressed, eliminating the possibility that the district court will alter its conclusion in subsequent proceedings.

Mitchell v. Forsyth, 472 U.S. 511, 527 (1985); *Wedding*, 89 F.3d at 318 (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1988)). Disapproval of a settlement that, if approved, would have resulted in a final judgment is the quintessential non-conclusive order. *See Seigal v. Merrick*, 590 F.2d 35, 38 (2d Cir. 1978). *Seigal*, like this case, concerns the appeal of a district court's order refusing to certify a settlement. 590 F.2d at 36. There, the Second Circuit held that refusing to certify a settlement is not an appealable collateral order because, by definition, it is not conclusive as to whether the court will allow the parties to settle—the parties will have countless opportunities to settle as litigation moves forward. *See id.* at 37-38. And that is exactly what happened; the parties agreed on an amended stipulation while appeal was pending. *Id.* at 39. Here, like in *Seigal*, Cardio and the class will have opportunities to amend their settlement and continue negotiating an agreement as trial proceeds.

Though the district court's decision is conclusive as to the *particular* settlement, *see Seigal*, 590 F.2d at 38, there is nothing stopping the parties from advancing a settlement later in litigation with the exact same terms. The district court may yet alter its conclusion and approve the settlement's terms if, for example, over the course of litigation it becomes clear that Cardio has a stronger case than it currently seems. All the district court has decided is that, given the information currently available, the settlement was not "fair, adequate, and reasonable"; it has not foreclosed the possibility that the settlement may be considered fair in light of facts that surface as trial proceeds. R. 242 (Mem. Op. and Order 242 (citing Fed. R. Civ. P. 23(e)(2))). Just the opposite—in setting a schedule to move the case toward trial,

the court opened itself up to this exact possibility. That the district court may issue an opinion later in the regular course of this litigation approving exactly what it just denied undermines the denial's conclusiveness.

2. The district court's order is not separate from the action's merits.

To be separate from the merits of an action, an order must be "conceptually distinct from the merits" of the parties' claims. *Mitchell*, 472 U.S. at 527-28. In contrast, an order that is "inextricably intertwined with the merits of the action" because the court considers the accuracy of any facts or the sufficiency of any pleadings in its analysis of the order is not appealable as a collateral order. *Cunningham*, 527 U.S. at 205.

Though the district court said that "it is not appropriate for a court to make determinations on the merits of the class claims in deciding whether to approve a class-action settlement," it nevertheless did a merits inquiry. R. 243 (Mem. Op. and Order 243). It evaluated the "relative strength of the parties' positions *on the merits*" to determine that the "settlement is not fair, adequate, and reasonable." *Id.* (emphasis added). While neither side advanced many disputed facts, the court went on to evaluate the adequacy of Cardio's and the class's responses to intervenors' objections that, for example, "this settlement does the most good for the most people" or "effectively compensates the class members for emotional distress." *Id.* at 242 (Mem. Op. and Order 242).

And the district court's merits inquiry was inevitable. "[A]n order disapproving a settlement" in a class action is, by its very nature based "upon an assessment of the merits of

the positions of the respective parties." *Seigal*, 590 F.2d at 37 (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)).

Though the Ninth Circuit has maintained that it is possible to evaluate the fairness of a class settlement without a merits analysis by simply balancing "what plaintiffs sought in their complaint and what the settlement provided," *Norman v. McKee*, 431 F.2d 769, 774 (9th Cir. 1970), this analysis of a settlement's fairness would be inadequate. For example, if there is a mismatch between the severity of the complaint's allegations and the quality of the settlement terms, but the complaint is overambitious and unlikely to succeed, the settlement might still be fair. Without looking at likelihood of success on the merits, a court would be at risk of erroneously determining a settlement as fair or unfair.

3. The district court's order is reviewable on appeal of a final judgment.

To be reviewable on appeal of a final judgment, moving toward trial must not irreparably deprive a litigant of rights that cannot effectively be vindicated after trial has occurred. *Mitchell*, 472 U.S. at 525; *Cohen*, 337 U.S. at 546; *Wedding*, 89 F.3d at 319. The unvindicatable rights that a collateral order must deny to be immediately appealable include chiefly immunities from suit, *Will v. Hallock*, 546 U.S. 345, 350 (2006) (citing *Mitchell*, 472 U.S. at 530 (qualified immunity); *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993) (Eleventh Amendment immunity); *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (absolute immunity); *Abney v. United States*, 431 U.S. 651, 660 (1977) (double jeopardy)), the denial of which "would imperil a substantial public interest." *Will*, 546 U.S.

at 353 (citing *Coopers & Lybrand*, 437 U.S. at 468). Because "almost any pretrial or trial order might be called 'effectively unreviewable' in the sense that relief from error can never extend to rewriting history," a simple determination of whether an order concerns an immunity from suit is insufficient. *Dig. Equip.*, 511 U.S. at 872. Instead, a determination of whether the immunity from suit implicates a "value of a high order" is the only thing "that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *See Will*, 546 U.S. at 353 (citing *Coopers & Lybrand*, 437 U.S. at 468).

While Cardio and class members may construe their settlement as granting them immunity from trial, the district court's "denying effect to [the class] settlement agreement does not come within the narrow ambit of collateral orders." *See Dig. Equip.*, 511 U.S. at 865. In *Digital*, Desktop Direct moved to rescind a settlement agreement because of Digital's misrepresentation during negotiations. *Id.* at 866. The district court granted this motion, and Digital appealed. *Id.* The Supreme Court held that Digital's appeal could not be heard because "rights under private settlement agreements can be adequately vindicated on appeal from final judgment." *Id.* at 869. Separately, the Court also held that securing an immunity from trial, of sorts, by agreeing to a settlement "does not rise to the level of importance needed" to be appealable as a collateral order. *Id.* at 877-78.

All that can be construed in this case as securing an immunity from standing trial is the settlement agreement. *See* R. 239 (Mem. Op. and Order 239). But, first, like in *Digital*, because Cardio and class members' immunity from trial comes from their private settlement, it is not important enough to be appealable as a collateral order. *See Dig. Equip.*, 511 U.S. at

877-78. And, second, as a settlement agreement that includes only monetary payment, the rights in the settlement could be adequately vindicated on appeal from a final judgment simply by retroactive reimbursement. *See* R. 241 (Mem. Op. and Order 241). The class members who, without the settlement, will have to pay their own medical bills could be made whole if they win at trial and are simply awarded damages.

Conclusion

For the foregoing reasons, this Court should dismiss this appeal for lack of jurisdiction.

Dated: October X, 20XX

Respectfully Submitted,

/s/Rachel Schwartz
Counsel for Intervenors

Applicant Details

First Name	**Dillon**
Last Name	**Schweers**
Citizenship Status	**U. S. Citizen**
Email Address	**daschweers@wm.edu**
Address	**Address** **Street** **1264 Faulkner Road** **City** **Virginia Beach** **State/Territory** **Virginia** **Zip** **23454**
Contact Phone Number	**7575509065**

Applicant Education

BA/BS From	**University of Mary Washington**
Date of BA/BS	**May 2021**
JD/LLB From	**William & Mary Law School** **http://law.wm.edu**
Date of JD/LLB	**May 18, 2024**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**William & Mary Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hamilton, Vivian
vhamilton@wm.edu
757-221-3839
McSweeney, Thomas J.
tjmcsweeney@wm.edu
757-221-3829

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Dillon Schweers
1264 Faulkner Road
Virginia Beach, Virginia 23454
(757) 550-9065 daschweers@wm.edu

June 8, 2023

The Honorable Juan R. Sánchez
Chief Judge
U.S. District Court for the Eastern District of Pennsylvania
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Judge Sánchez:

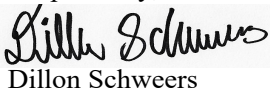
I am a third-year student at William & Mary Law School, where I am tied for first in my class with a 3.9 G.P.A. and serve as an Articles Editor for the *William & Mary Law Review*. I am writing to apply for a judicial clerkship in your chambers for the 2024–2025 term. My internship last summer with U.S. District Judge John A. Gibney, Jr., sparked my interest in pursuing a clerkship. I hope to devote my career to serving incarcerated and formerly incarcerated people, so I would appreciate the opportunity to clerk for a former public defender and legal aid attorney like yourself.

My time in chambers last summer challenged me, and what I gained is invaluable. For instance, I had to sift through the Virginia Code for anything related to administering elections to write a memorandum on a motion to dismiss a pro se plaintiff's claims—the lack of citations in the complaint made this particularly difficult. Through experiences like that, I learned how to pare a complex legal issue down to its essential questions. I put my new skill to use when I wrote a student note entitled *Why (and How) the Constitution Should Protect Prisoners from Gratuitous Disclosure of their HIV/AIDS Status*. In the piece, I argue that a recent Fourth Circuit decision improperly narrowed the constitutional privacy rights of incarcerated people living with HIV/AIDS. Countless revisions and rewrites paid off as the *Law Review* staff selected my note for publication.

As an Articles Editor for the *Law Review*, I am responsible for a full technical edit of each article I am assigned. This entails going over and correcting the edits of all the cite checkers assigned to my article while also adding edits of my own. Depending on the length of the article, this could mean verifying hundreds of citations for both accuracy of information and compliance with the Bluebook. My proficiency in legal citation, grammar, and style through my position as an Articles Editor, paired with my experience as a judicial intern, will enable me to make a valuable contribution to your chambers.

Enclosed for your review are my resume, writing sample, law school transcript, and letters of recommendation from Professors Vivian Hamilton and Thomas McSweeney, Ph. D. In addition, Judge Gibney has agreed to serve as a reference for me and may be contacted by phone, (804) 916-2870, or email, john_gibney@vaed.uscourts.gov. I would welcome the opportunity to discuss my qualifications in greater detail in an interview. Thank you for your consideration.

Respectfully,



Dillon Schweers

Dillon A. Schweers
1264 Faulkner Road | Virginia Beach, Virginia 23454
daschweers@wm.edu | (757) 550 - 9065

EDUCATION

William & Mary Law School, Williamsburg, Virginia
Juris Doctor expected, May 2024
G.P.A.: 3.9, Class Rank: tied 1/175

Honors: ***William & Mary Law Review***, Articles Editor
Alternative Dispute Resolution Team, Tournament Director
Mary Siegrist Hinz Leadership Fellow, full-tuition merit scholarship

Activities: Public Service Fund, Faculty Outreach Subcommittee Chair
National Lawyers Guild, founding member
Restorative Justice Collective

Publication: Note, *Why (and How) the Constitution Should Protect Prisoners from Gratuitous Disclosure of their HIV/AIDS Status*, 65 WM. & MARY L. REV. (forthcoming 2023).

University of Mary Washington, Fredericksburg, Virginia
Bachelor of the Arts, *summa cum laude*, Political Science and International Affairs, May 2021
G.P.A.: 3.96

Honors: Pi Sigma Alpha Best Undergraduate Class Paper Competition Winner (Spring 2021)
Marilyn Mead and William J. Burke, Washington Scholarship, full merit scholarship
Honor Council, Student Honor Advisor

Activities: Varsity Track and Cross Country, 2019 All-Conference Cross Country Team

Honors Thesis: Crude Measures: Assessing the Success and Failure of Maximum Pressure Campaigns, (analysis of U.S. sanctions regimes against Iran and Venezuela)

EXPERIENCE

Center for Death Penalty Litigation, Durham, North Carolina
Summer Intern — June to August 2023
Expected responsibilities will include visiting clients, interviewing witnesses and jurors, conducting research and writing for direct appeal and post-conviction claims, and assisting attorneys at evidentiary hearings.

Professor Vivian Hamilton, William & Mary Law School, Williamsburg, Virginia
Civil Procedure Teaching Assistant — August to December 2022
Led several review sessions throughout the fall 2022 semester for first-year Civil Procedure class. Held weekly office hours for approximately seventy students. Reviewed in-class exercises with students as needed.

The Honorable John A. Gibney, Jr., U.S. District Judge
U.S. District Court for the Eastern District of Virginia, Richmond, Virginia
Judicial Intern — May to August 2022
Researched and prepared legal memoranda on topics including constitutional standing, state election law, state tort law, sovereign immunity, and Section 1983. Drafted two judicial opinions on motions to dismiss. Observed criminal and civil court proceedings daily.

INTERESTS

Acoustic guitar, inspired by artists like John Denver and Glen Campbell.
Running, especially on the trails of local state parks.

WILLIAM & MARY LAW SCHOOL
OFFICE OF CAREER SERVICES

DILLON A. SCHWEERS

Unofficial Transcript

Note to Employers from the Office of Career Services regarding Grade Point Averages and Class Ranks:

- Transcripts report student GPAs to the nearest hundredth. **Official GPAs are rounded to the nearest tenth and class ranks are based on GPAs rounded to the nearest tenth.** We encourage employers to use official Law School GPAs rounded to the nearest tenth when evaluating grades.
- Students are ranked initially at the conclusion of one full year of legal study. Thereafter, they are ranked only at the conclusion of the fall and spring terms. William & Mary does not have pre-determined GPA cutoffs that correspond to specific ranks.
- Ranks can vary by semester and class, depending on a variety of factors including the distribution of grades within the curve established by the Law School. Students holding a GPA of 3.6 or higher will receive a numerical rank. All ranks of 3.5 and lower will be reflected as a percentage. The majority of the class will receive a percentage rather than individual class rank. In either case, it is likely that multiple students will share the same rank. Students with a numerical rank who share the same rank with other students are notified that they share this rank. Historically, students with a rounded cumulative GPA of 3.5 and above have usually received a percentage calculation that falls in the top 1/3 of a class.
- Please also note that transcripts may not look the same from student-to-student; some individuals may have used this Law School template to provide their grades, while others may have used a version from the College's online system.

Transcript Data

STUDENT INFORMATION

Name : Dillon A. Schweers

Curriculum Information

Current Program
Juris Doctor
College: School of Law
Major and Department: Law, Law

***Transcript type:WEB is NOT Official ***

DEGREES AWARDED

Sought: Juris Doctor **Degree Date:**

Curriculum Information

Primary Degree
College: School of Law
Major: Law

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Institution:	14.000	14.000	14.000	13.000	49.90	3.83

INSTITUTION CREDIT -Top-

Term: Fall 2021

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	101	LW	Criminal Law	A-	4.000	14.80	
LAW	102	LW	Civil Procedure	A	4.000	16.00	
LAW	107	LW	Torts	A-	4.000	14.80	
LAW	130	LW	Legal Research & Writing I	A	2.000	8.00	
LAW	131	LW	Lawyering Skills I	H	1.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	14.000	53.60	3.82
Cumulative:	15.000	15.000	15.000	14.000	53.60	3.82

Unofficial Transcript

Term: Spring 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	108	LW	Property	A	4.000	16.00	
LAW	109	LW	Constitutional Law	A-	4.000	14.80	
LAW	110	LW	Contracts	A	4.000	16.00	
LAW	132	LW	Legal Research & Writing II	A-	2.000	7.40	
LAW	133	LW	Lawyering Skills II	H	2.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	14.000	54.20	3.87
Cumulative:	31.000	31.000	31.000	28.000	107.80	3.85

Unofficial Transcript

Term: Fall 2022

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	117	LW	The Legal Profession	A	3.000	12.00	
LAW	394	LW	Post-Conflict Justice & Law	A	3.000	12.00	
LAW	402	LW	Crim Pro II (Adjudication)	A	3.000	12.00	
LAW	454	LW	Economic Analysis of the Law	A	3.000	12.00	
LAW	760	LW	Wm & Mary Law Review	P	1.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	13.000	13.000	13.000	12.000	48.00	4.00
Cumulative:	44.000	44.000	44.000	40.000	155.80	3.89

Unofficial Transcript

Term: Spring 2023

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	309	LW	Evidence	A-	4.000	14.80	
LAW	355	LW	Gender, Sexuality, & Law	A	3.000	12.00	
LAW	401	LW	Crim Proc I (Investigation)	A-	3.000	11.10	
LAW	477	LW	Section 1983 Litigation	A	3.000	12.00	
LAW	760	LW	Wm & Mary Law Review	P	1.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	14.000	14.000	14.000	13.000	49.90	3.83
Cumulative:	58.000	58.000	58.000	53.000	205.70	3.88

Unofficial Transcript

TRANSCRIPT TOTALS (LAW - FIRST PROFESSIONAL) -Top-

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	58.000	58.000	58.000	53.000	205.70	3.88

Total Transfer:	0.000	0.000	0.000	0.000	0.00	0.00
Overall:	58.000	58.000	58.000	53.000	205.70	3.88

Unofficial Transcript

COURSES IN PROGRESS -Top-

Term: Fall 2023

Subject	Course	Level	Title	Credit Hours
LAW	400	LW	First Amend-Free Speech & Pres	3.000
LAW	485	LW	Immigration Law	3.000
LAW	720	LW	Trial Advocacy	3.000
LAW	747	LW	Innocence Project Clinic I	3.000
LAW	760	LW	Wm & Mary Law Review	2.000

Unofficial Transcript

William & Mary Law School

Vivian Hamilton
Professor of Law

Center for Racial & Social Justice
P.O. Box 8795
Williamsburg, VA 23187-8795

Telephone: (757) 221-3839
Email: vhamilton@wm.edu

June 08, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I enthusiastically recommend Dillon Schweers for a judicial clerkship. I have come to know Dillon well—both within and outside of classroom settings—since first meeting him in the fall of 2021. I worked closely with Dillon last fall, when I recruited him to be the teaching assistant in my Civil Procedure course. He is a superb student and a generous and knowledgeable teacher. I am certain that he will make a first-rate law clerk and attorney.

Dillon was a student in my Civil Procedure course last academic year. He is currently enrolled in my Gender, Sexuality & Law course, which focuses on advanced issues in Constitutional Law and Section 1983 litigation, as well as Title VII and Title IX. His mastery of Civ Pro as well as the doctrines he will encounter in the elective course will both serve him well in a federal clerkship.

The elective course is barely underway, but in Civil Procedure, Dillon's ready and regular participation distinguished him. He was always well prepared, and his comments and questions revealed a sophisticated capacity for legal analysis. I still recall how Dillon's questions probed the contours of various jurisdictional doctrines, and he contributed to discussions that helped clarify complex ideas and enrich the understanding of all the students in the class. Simply put, the course was better for Dillon's participation in it.

Dillon earned an "A" in Civil Procedure and wrote one of the top two exams in a course of more than 70 students. Indeed, Dillon's work ethic and intelligence have driven him to perform well in all his doctrinal courses. He is also a strong writer, having earned the highest grade in his Legal Research & Writing course. I note as well that Dillon has also earned a position as an editor of the William & Mary Law Review, where he is continuing to hone his analytical and writing skills.

Dillon excelled as a teaching assistant in Civ Pro last semester: he has retained an impressive command of the material, and the students in the class repeatedly remarked how helpful he was to them during his weekly office hours. Over the semester, Dillon was generous with his time and patiently fielded as many questions as students brought to him.

Dillon was also highly organized, and he thoughtfully developed and conducted numerous review sessions for the entire class—nearly 80 students. His sessions consisted of both doctrinal review and working through hypothetical problems. The students found these sessions invaluable. In short, Dillon contributed greatly to the course during the time he and I worked together. I would hire him again without hesitation.

Any judge with whom Dillon works will surely reap the benefit of his intelligence, energy, and work ethic. I am confident that his legal research, analytical, and writing skills will serve him especially well in a judicial clerkship. I have no doubt that he will make significant contributions to the practice of law, and that the success Dillon has enjoyed at William & Mary will continue as he pursues his legal career.

I must note in closing that, in addition to his academic excellence, Dillon is kind, funny, and easy-going. He is well-liked and respected by his classmates and professors alike. Please do not hesitate to contact me (vhamilton@wm.edu or 202-841-7772) if you wish to speak further.

Sincerely,

/s/

Vivian E. Hamilton
Professor of Law

Founding Director, William & Mary Center for Racial & Social Justice
William & Mary School of Law

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The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Dillon Schweers for a clerkship in your chambers. Dillon is a really exceptional student, at the very top of his class here at William & Mary Law School. He has taken two classes with me and has been a standout student in each class. He received the CALI award for the highest grade out of 85 students in my property course and also received an A in my course The Legal Profession: A Historical Approach. Dillon is exceptionally bright and would make an outstanding clerk.

I have had the opportunity to work with Dillon both in the context of a large doctrinal course and a smaller, discussion-based course, and he has excelled in both contexts. I was particularly impressed with the thoughtfulness of his writing in The Legal Profession. In that course, I ask the students to do a number of free-writing assignments. I ask the students, after they have done particular readings, to write for fifteen minutes about something that struck them in the reading. These are ungraded, do not have to be edited, and are really just meant to spark discussion. Dillon's writings were incisive and written in polished prose. For instance, we read selections from two books about the ethos of lawyers in nineteenth-century America, Amalia Kessler's Inventing American Exceptionalism, which discusses the Civic Republican ideology that undergirds William & Mary Law School's citizen-lawyer ideal, and Brian Dirck's Lincoln the Lawyer, which discusses Abraham Lincoln's career and the practice of law in nineteenth-century Illinois more generally. For one of his assignments, Dillon put these two books into conversation with each other, pointing out that there was very little sign of Civic Republican ideals in Lincoln's own idea of what it meant to be a lawyer. Dillon went on to comment that the contrast between Lincoln and the Civic Republicans had helped him to see one of the shortcomings of the Civic Republican ideology: although the Civic Republicans' emphasis on law as a public calling meant that lawyers were dedicated to serving their communities, this ideology also led to a certain amount of arrogance. Lawyers affected by Civic Republican thought tended to think that "the whole of the country's democratic system rested on their shoulders," as Dillon put it. I thought this was insightful, and it showed that Dillon had not just read the readings for class; he had spent time mulling them over before class.

I should also say that you would never know from his personality that Dillon is one of the top students in the class. He does not have a "gunner" personality and has never tried to monopolize class conversation. He was always a regular participant in class discussion but does not use class discussion as an opportunity to show off. All of my interactions with him have been very, very pleasant, and I expect that he would be a joy to work with.

I think Dillon would make a great clerk and I sincerely hope you hire him. If you have any further questions about Dillon, please feel free to contact me by email at tjmcsweeney@wm.edu, or by phone at (757) 221-3829.

Sincerely,

/s/

Thomas J. McSweeney

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WRITING SAMPLE

I prepared this draft opinion for my judicial internship under the Honorable John A. Gibney, Jr., United States District Judge for the Eastern District of Virginia. In the interest of brevity, this sample contains only the statement of facts and analysis for one of nine claims. I have permission from Judge Gibney to use this draft; I have changed the names of each individual at Judge Gibney's request. The draft is substantially my own work, though my supervising clerk provided limited feedback throughout the drafting process.

DRAFT OPINION

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I. FACTS ALLEGED IN THE COMPLAINT

On July 31, 2020, Aaron Williams was arrested and detained at the Chesapeake Correctional Center. (ECF No. 16 ¶ 19.) Following his detention, the jail did not have his particular medication for the first few days, but family members were able to drop it off. (*Id.* ¶ 20–22.) The jail's medical personnel work for CCS, a private corporation, under the supervision of Dr. Andrew Tyler, the Medical Director of the Chesapeake Correctional Center. (*Id.* ¶¶ 12–13.)

On May 4, 2021, Williams again did not receive his medication. (ECF No. 16 ¶ 24.) He explained to the nurse on duty, Janet White, "the severity of his health condition and that it was imperative for him to take his medication." (*Id.* ¶ 25.) He also explained that missing medication "could cause his body to build a resistance and possibly contract an opportunistic infection." (*Id.* ¶ 26.) White replied, "[t]hat is not my problem." (*Id.* ¶ 27.) Williams then asked if she would tell Beth James, the Director of Nursing, that he needed bloodwork to monitor his disease. (*Id.* ¶¶ 28, 30.) He explained that he had not received any bloodwork since his detention and that prior to his detention he received bloodwork every ninety days. (*Id.* ¶ 29.) White told Williams, "[i]t is not my responsibility to report that." (*Id.* ¶ 31.)

Also on May 4, 2021, Williams asked Deputy Gore about seeing medical staff and receiving his medication. (*Id.* ¶ 33.) Gore then "made an intentional decision to publicly disclose, in a joking manner, ... [Williams's medical condition] and [that he] needed his medication." (*Id.* ¶ 34.) The disclosure occurred within earshot of thirteen inmates, including Daniel Mitchell, who began laughing along with Gore. (*Id.* ¶¶ 35, 38.) On May 6, 2021, Williams filed a grievance pertaining to the delay in medication. The grievance stated: